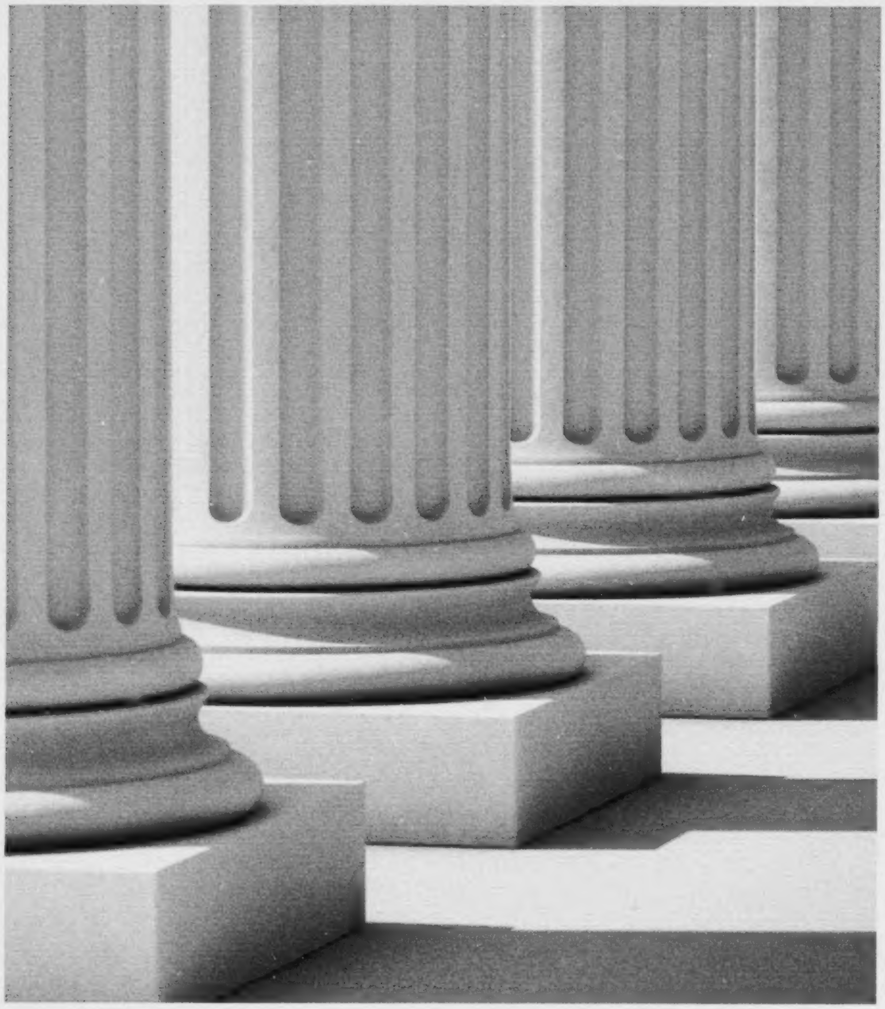
ALBERTA
LAW REFORM
INSTITUTE

A NEW TRUSTEE ACT FOR ALBERTA



REPORT FOR DISCUSSION

28

NOVEMBER 2015

RESPONSIBILITY
AHEAD

ALBERTA
LAW REFORM
INSTITUTE

A NEW TRUSTEE ACT FOR ALBERTA

REPORT FOR DISCUSSION | **28**

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ISSN 0834-9037
ISBN 978-1-896078-66-3

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Deadline for comments on the issues raised in this document is March 31, 2016

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This Report for Discussion by the Alberta Law Reform Institute (ALRI) proposes new trustee legislation for Alberta. The Report reviews the Uniform Law Conference of Canada's recent Uniform Trustee Act, Alberta's current *Trustee Act*, the common law of trusts, and Alberta policy, and makes recommendations for new trustee legislation in Alberta.

We welcome any comments that you may have in support of or in opposition to the recommendations in this Report or additional options for reform.

The purpose of issuing a Report for Discussion is to allow interested persons the opportunity to consider these proposals and to make their views known to ALRI. You may respond to one, a few or all of the issues raised. Any comments sent to us will be considered when the ALRI Board makes final recommendations.

You can reach us with your comments or with questions about this document on our website, by fax, mail or e-mail to:

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Law reform is a public process. **ALRI assumes that comments on this Report for Discussion are not confidential.** ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although we usually discuss comments generally and without attribution. If you would like your comments to be treated confidentially, you may request confidentiality in your response or you may submit comments anonymously.

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Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on November 15, 1967 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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Acknowledgments

The basis for this Report for Discussion is the Uniform Trustee Act (2012) prepared by the Uniform Law Conference of Canada. The ULCC Working Group on the Uniform Trustee Act was co-chaired by our Director, Peter JM Lown QC and Russell Getz with the British Columbia Ministry of Justice. ALRI relied heavily on the Uniform Trustee Act and its commentary throughout the creation of this Report.

The preparation of this Report benefitted greatly from the advice and assistance of an expert Project Advisory Committee. The direction and insight of the Committee assisted ALRI counsel and the Board in making proposals for reform. We express our deep thanks to the members of this Committee:

Honourable Justice Craig M Jones, Court of Queen's Bench

Dennis J Pelkie QC, Borden Ladner Gervais LLP

Karen A Platten QC, McLennan Ross LLP

Philip J Renaud QC, Duncan Craig LLP (Mr. Renaud also sat on the ULCC Working Group for the Uniform Trustee Act)

We are also grateful to Donna Molzan QC, Alberta Justice, for her thoughtful feedback and assistance in the preparation of this Report. As well, considered research and analysis was conducted by William Hurlburt QC, ALRI Consultant.

Several ALRI counsel have contributed to the preparation of this Report. Cheryl Hunter Loewen prepared the background memoranda which formed the bases for much of the Report. Robyn Mitchell and Sandra Petersson conducted additional research and analysis and wrote the Report. The ALRI Board provided vision and improvements to the overall Report. Editorial assistance and writing was provided by Katherine MacKenzie. Student research assistance was provided by Jarrod Hone and Kathryn Griffin. The Report was prepared for publication by Ilze Hobin.

Summary

A trust is a fiduciary relationship created at the direction of an individual (the settlor) in which one or more persons (the trustees) hold property subject to certain duties to use and protect it for the benefit of others (the beneficiaries). The trust was developed in medieval England and has been in use for centuries. There are many different types of trusts that are used in many different situations.

History of Alberta's Trustee Legislation

The Trustee Ordinance was Alberta's first trustee statute. It was modelled on an 1893 English statute and was first enacted in 1903. *The Trustee Ordinance* evolved into the *Trustee Act* which is in force in Alberta today.

Though the *Trustee Act* has been subject to certain amendments over the years, many provisions remain unchanged from the original version. In fact, in the 112 years since the first version was enacted, there has never been a comprehensive review of the *Trustee Act*. As a result, Alberta's trustee legislation has become outdated and out of touch with modern trust practice.

Uniform Law Reform

In 2007, the Uniform Law Commission of Canada (ULCC) undertook a project on trustee legislation reform. The goal of the project was to develop a modern trust statute that would be suitable for enactment across Canada. As part of the project, the ULCC identified two fundamental purposes of modern trust legislation. Specifically, trustee legislation should:

- Establish trustee powers which are necessary for the proper administration of trusts in situations where powers are not adequately enabled by the trust instrument; and

- Describe court authority to direct trustees and otherwise intervene if necessary to ensure trusts function properly.

Further, the ULCC Working Group, which included representatives from Alberta, established four general recommendations that would guide the drafting process:

- Trustees should be able to act by majority.

- Where all beneficiaries are capable adults and consent, they should be able to vary and terminate the trust.

- The Uniform Act should contain provisions respecting charitable trusts.
- The rules against perpetuities and accumulations should be abolished.

The above purposes and recommendations were ultimately incorporated into the *Uniform Trustee Act, 2012* [Uniform Act]. The basic scheme of the Uniform Act provides that, with certain exceptions, it will only apply when the trust instrument is silent on an issue.

Relevance of the Uniform Act in Alberta

The creation of the Uniform Act provides an excellent starting point for trustee legislation reform in Alberta. However, certain aspects must be enhanced, tailored and clarified to reflect Alberta's particular needs. While it is appropriate to adhere to the ULCC's guiding principles, only two of the four general recommendations are carried forward for enactment in Alberta at present. Specifically, ALRI agrees that trustees should be able to act by majority and that trustee legislation should contain provisions respecting charitable trusts. However, ALRI considers it is not appropriate to allow beneficiaries to vary or terminate a trust without court approval. Further, the potential abolition of the rule against perpetuities would be better dealt with through a distinct and focused analysis. A separate project relating to perpetuities reform has been approved by the ALRI Board and is currently in its early stages of research and analysis.

Should Alberta Implement the Uniform Act?

ALRI's investigation and analysis of the Uniform Act began with a section by section comparison of the Uniform Act and the *Trustee Act*. The purpose of the comparison was to identify:

- Major policy differences between the two Acts;
- Changes to the common law under the Uniform Act;
- New concepts presented in the Uniform Act; and
- Concepts found in the *Trustee Act* that have no equivalent in the Uniform Act.

ALRI convened an Advisory Committee, comprised of leading trust law experts from across Alberta, to assist with the analysis of the Uniform Act. Questions arising from the section by section comparison were referred to the Advisory Committee.

Following the comparison and review by the Advisory Committee, ALRI's preliminary recommendation is that Alberta law should generally conform to the Uniform Act, with specific modifications to reflect Alberta law, policy and practice. In other words, unless otherwise indicated in this report, the provisions of the Uniform Act should be adopted in Alberta.

Scope of the Report

This report makes preliminary recommendations in several areas:

- Trustee legislation should establish that the trust instrument prevails, with specific exceptions set out in the legislation.

- Trustee legislation should adopt the two-tier standard of care proposed by the Uniform Act. An ordinary trustee must exercise ordinary care, diligence and skill when dealing with trust property, while professional trustees must demonstrate a greater degree of care, diligence and skill. This tiered standard will ensure that any trustee who brings, or should bring, special knowledge and skill to the performance of his or her trustee duties will be held to a higher standard.

- Trustee legislation should define conflict of interest and provide a process to allow a trustee to act in certain ways despite a conflict. This will reflect the common law and reduce conflict and uncertainty in situations where a trustee must act in the face of a conflict.

- Trustee legislation should authorize trustees to act by majority, provided the trust was established after the new legislation comes into force. This change will bring the rule for trustees of private trusts into alignment with the rule governing public and charitable trusts, facilitate efficient trust management, and remove the veto power that is created when trustees must act unanimously. It also reflects modern trust practice.

- Trustee legislation should provide that the provisions regarding trustee compensation prevail over contrary terms in the trust instrument. This will ensure that trustees receive fair and reasonable compensation, and that they are not bound by a trust instrument that sets compensation at a level that is too low. Similarly, it will allow beneficiaries to bring the matter of trustee compensation before the court.

- Trustee legislation should allow a trustee to make a payment from capital to a beneficiary with a vested interest without court approval. This is a modern and sensible development in the law that allows trustees to appropriately address changing circumstances through the life of a trust. However, trustee legislation should retain the requirement of court approval for a trustee to make a payment from capital to a beneficiary with a contingent interest.

- Trustee legislation should not apply to personal representatives of an estate when they are acting in their capacity as personal representative. This reflects the reality that personal representatives have different roles than trustees and ensures that trustee provisions that are not appropriate for personal representatives do not apply to them. The structures for administering property under trustee legislation are very different from the structures contained in estate administration legislation, and it is inappropriate for those structures to apply to personal representatives in their capacity as personal representative. However, trustee legislation should apply to personal representatives when they are acting in their capacity as trustees.

- Trustee legislation should retain the prudent investor rule, as it is articulated in section 3 of the *Trustee Act*.

- Trustee legislation should require court approval for any proposed variation or termination of the trust. Court oversight allows the court to balance the beneficiaries' request against other factors, such as the settlor's intent, the circumstances surrounding the beneficiaries' request, and tax implications.

- Trustee legislation should provide a mechanism to validate and regulate non-charitable purpose trusts.

Recommendations

RECOMMENDATION 1

The new Act should adopt the Uniform Act. However, specific provisions contained in the Uniform Act should be modified, or existing Alberta provisions included, to reflect Alberta trust law and best practice. 9

RECOMMENDATION 2

The new Act should adopt the standards of care as proposed in Uniform Act sections 26 and 31 including the higher standard of care set out for professional trustees. 15

RECOMMENDATION 3

The new Act should retain the current prudent investor rule, as expressed in *Trustee Act* section 3(2) [trustee must invest with the view of obtaining a reasonable return while avoiding undue risk], section 3(3) [trustee must periodically review the appropriateness of investments], and section 3(5) [matters that a trustee must consider when planning investments]. 16

RECOMMENDATION 4

The new Act should authorize a trustee to delegate to another person, for a specified period of time, the authority to administer all or part of the trust or to exercise some or all of the trustee's powers, including distributive powers, or to perform some or all the trustee's duties 22

RECOMMENDATION 5

In the event that a trustee is unable to act by reason of temporary absence or incapacity that does not result in the trustee ceasing to be a trustee, the new Act should authorize a designated person to authorize a person, for a specified period of time, to administer all or part of the trust or to exercise some or all of the trustee's powers, including distributive powers, or to perform some or all the trustee's duties 22

RECOMMENDATION 6

Under the new Act, the trustee should resume his or her role as trustee at the end of the specified period. 23

RECOMMENDATION 7

The new Act should not provide for the delegation of trust powers by power of attorney. 23

RECOMMENDATION 8

The new Act should clarify the trustee's responsibility to communicate with beneficiaries by adopting the concept of a qualified beneficiary as proposed in Uniform Act sections 1 and 101. The new Act should consolidate the qualified beneficiary definition into one, unified provision. 24

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The new Act should not apply to implied, resulting or constructive trusts or to any other trust that arises by operation of law as proposed in Uniform Act section 2(3). 31

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The new Act should not apply to trusts that arise by enactment unless expressly incorporated into other enactments........ 34

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The new Act should apply to personal representatives in their capacity as trustees; however, the new Act should not apply to personal representatives when they are acting in their capacity as personal representatives except as provided in estate administration legislation........ 37

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- A suitable replacement trustee is able and willing to act; and
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- A court order discharging the trustee. 57

RECOMMENDATION 20
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The new Act should expand and clearly describe a trustee's duty to report to beneficiaries as proposed in Uniform Act sections 28 and 29. 76

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RECOMMENDATION 52

The new Act should provide that the court must consider the following factors in deciding whether to approve an arrangement:

- The nature of all interests and the effect any proposed varying arrangement may have on those interests;
- The benefit or detriment to any person that may result from the court approving, or declining to approve, any proposed varying arrangement;
- The intentions of the settlor to the extent these can be ascertained; and 134
- The impact of tax and other statutory provisions. 134

RECOMMENDATION 53

The new Act should allow a court to approve an arrangement on behalf of a person who refuses consent. 136

RECOMMENDATION 54

The new Act should provide that the court must not approve an arrangement on behalf of a person if the effect of the arrangement would be to reduce or remove any fixed indefeasible interest or interest that has vested absolutely in a beneficiary. 136

RECOMMENDATION 55

The new Act should allow a court to approve an arrangement on behalf of a person who is unable to consent by reason of minority, incapacity or other circumstances. 138

RECOMMENDATION 56

Unless the trust instrument provides otherwise, trustee legislation should continue to provide that the court may not permit a donee to exercise a power of appointment to their own benefit as provided in *Trustee Act* section 42(8). 139

RECOMMENDATION 57

The new Act should provide that court authority to vary a trust, in accordance with this Act, prevails over contrary provisions in a trust instrument. 139

RECOMMENDATION 58

The new Act should include trustee compensation provisions that prevail over contrary provisions in a trust instrument. 147

RECOMMENDATION 59

The new Act should clarify how applications concerning compensation may be brought before a court as proposed by Uniform Act section 64 with the following additions:

- A beneficiary should be able to apply to the court for a decision concerning fair and reasonable trustee compensation; and
- The court should be able to consider the "terms of a contract" outlining compensation. 148

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Table of Abbreviations

LEGISLATION

Adult Guardianship and Trusteeship Act	*Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2.
Charitable Fund-raising Act	*Charitable Fund-raising Act*, RSA 2000, c C-9.
Estate Administration Act	*Estate Administration Act*, SA 2014, c E-12.5.
Land Titles Act	*Land Titles Act*, RSA 2000, c L-4.
Public Trustee Act	*Public Trustee Act*, SA 2004, c P-44.1.
Surrogate Rules	*Surrogate Rules*, Alta Reg 130/1995.
Trustee Act	*Trustee Act*, RSA 2000, c T-8.
Uniform Act	Uniform Law Conference of Canada, *Uniform Trustee Act* (2012).
Wills and Succession Act	*Wills and Succession Act*, SA 2010, c W-12.20.

SECONDARY SOURCES

ULCC Final Report	Uniform Law Conference of Canada, Civil Section, *Uniform Trustee Act Final Report of the Working Group* (August 2012), online: <www.ulcc.ca/en/2012-whitehorse-yk/599-civil-section-documents-2012/1254-uniform-trustee-act-final-report-of-the-working-group>.
Waters	Donavan WM Waters, Mark R Gillen & Lionel D Smith, eds, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Thomson Reuters Canada Ltd, 2012).

CHAPTER 1

Principles and Approach

A. Introduction

1. BASIC PRINCIPLES

[1] Trusts have a long history in English and Canadian common law. Trusts have been used throughout the years by different parties for various purposes, and those purposes have changed over time.

[2] It can be difficult to define or describe a trust. One of the best definitions of a trust is as follows: [1]

> A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.

[3] There are several parties involved in a trust relationship; namely, the settlor, the trustee and the beneficiaries. The settlor is the person who owns property, or an interest in property, and wants to create a trust to benefit certain persons or purposes, known as the beneficiaries. The settlor chooses a trustee who holds the title to, and deals with, trust property for the sole benefit of the beneficiaries. The trustee has certain duties and powers. The beneficiaries have a beneficial interest in the trust property and the ability to compel the trustee to perform the trust. There is a fiduciary relationship between the trustee and the beneficiaries. In managing and handling the trust property, and administering the trust, the trustee must act in the best interests of the beneficiaries.[2]

2. CREATION AND CLASSIFICATION OF TRUSTS

[4] There are three essential characteristics, or certainties, needed to create a trust:

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[1] LA Sheridan, *The Law of Trusts*, 12th ed (London: Barry Rose Law Publishers, 1993) at 3 [footnote omitted].

[2] Donovan WM Waters, Mark R Gillen & Lionel D Smith, eds, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Thomson Reuters Canada Ltd, 2012) at 9-10 [Waters].

- Certainty of intention;
- Certainty of subject-matter; and
- Certainty of objects.

Certainty of intention means that a settlor must intend to create a trust before a trust will be established. Certainty of subject-matter means that it must be possible to clearly identify both the property that will be subject to the trust and each beneficiary's share of that property. Certainty of objects refers to the identification of, or the ability to identify, the persons or purposes intended to benefit from the trust.[3]

[5] Trusts are used in many different situations and there are many different types of trusts. An express trust is created when a settlor specifically states that certain property is to be held in trust for particular persons or purposes; while an implied trust arises when a court has to determine what a settlor intended and ultimately determines the settlor intended to create a trust.[4]

[6] A resulting trust arises when trust property results back to a settlor. A resulting trust occurs either because the transferor intended that outcome or because, in the circumstances, the court ordered the resulting trust property back to the settlor.[5] A constructive trust is created when a court employs trust principles to describe one party's obligation to transfer certain property to another. These trusts are constructed by a court to enforce an obligation.[6]

[7] Private trusts are trusts created for specific and determinable persons. Public trusts are also known as charitable trusts and can be created to benefit certain classes or sectors of the public or to carry out a charitable purpose. Non-charitable purpose trusts are trusts created to benefit purposes that are not charitable.[7]

[8] Statutory trusts, also known as trusts created by enactment, are trusts created by federal or provincial statute. There are numerous examples of statutory trusts; for example, the trust that gives the federal Crown the status of secured creditor of a party in bankruptcy. Under this type of trust, the bankrupt

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[3] Waters at 140.

[4] Waters at 20.

[5] Waters at 20-21.

[6] Waters at 23.

[7] Waters at 28-29.

party is under a statutory duty to remit certain monies to the Crown, such as employee income tax, Employment Insurance, or Canada Pension Plan deductions.[8]

B. Need for Reform

1. ALBERTA'S *TRUSTEE ACT*

[9] Alberta's *Trustee Act* is similar to the trustee legislation in force in most other Canadian provinces. It is based on English statutes developed in the late nineteenth century. [9] In particular, the province's first trust legislation, *The Trustee Ordinance*, was modeled on the English Act of 1893. [10]

[10] The English trustee statutes developed due to changes in the law of real property. Trust reforms were intended to expand the usefulness of the trust beyond family land matters and to confer powers on trustees.[11]

[11] The law of trusts and trustees continues to evolve in Alberta. In particular, in 2000 the Alberta courts were restructured and provisions of the *Trustee Act* were modified to reflect the merger of the Surrogate Court into the Court of Queen's Bench.[12]

[12] In 2001, the *Trustee Act* was further amended with detailed provisions concerning investment of trust funds included in a Schedule.[13] In 2003 and 2004 sections of the *Trustee Act* were revised to conform to definitions and terms in other legislation.[14] The amendments that began in 2001 were completed in 2006 and the Schedule and transitional provision were repealed.[15]

[13] In 2008, Alberta's dependant adult legislation was revised and sections of the *Trustee Act* were modified and repealed accordingly.[16] Minor changes were

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[8] Waters at 29.

[9] *Trustee Act*. RSA 2000, c T-8 [*Trustee Act*].

[10] *An Ordinance respecting Trustees and Executors and the administration of Estates*, ONWT 1903 (2nd Sess), c 11 [*Trustee Ordinance*]; see also *Trustee Act, 1893* (UK), 56 & 57 Vict, c 53.

[11] Law Reform Commission of Saskatchewan, *The Status of English Statute Law in Saskatchewan* (1990) at 125.

[12] *Justice Statutes Amendment Act*, RSA 2000 (Supp) c 16, s 59.

[13] *Trustee Amendment Act*, SA 2001, c 28, s 2.

[14] *Family Law Act*, SA 2003, c F-4.5, s 126; *Minors Property Amendment Act*, SA 2004, c M-18.1, s 22; *Public Trustee Act*, SA 2004, c P-44.1, s 52 [*Public Trustee Act*].

[15] *Trustee Amendment Act, 2006*, SA 2006, c 9.

[16] *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 151 [*Adult Guardianship and Trusteeship Act*].

made in 2009 to adjust terminology in the *Trustee Act* to match the revised civil rules of court.[17]

[14] Finally, in 2010, a section in the *Trustee Act* concerning pension plan and fund beneficiary designations was repealed in light of new provisions enacted in wills and succession legislation.[18]

[15] Although the *Trustee Act* has been subject to certain amendments and revisions over the years, there has never been a comprehensive review of the *Trustee Act*. Based on an 1893 English statute, and with many provisions unchanged from the original statute, the *Trustee Act* has fallen out of step with current trust practices and does not address or provide guidance on modern trust issues.

2. UNIFORM LAW REFORM

[16] Trustee legislation has been under review in Canada for several decades. For example, it has been the subject of reports by the Ontario Law Reform Commission (1984), the British Columbia Law Reform Institute (2004) and the Uniform Law Conference of Canada [ULCC] (2012).[19]

[17] Beginning in 2007 the ULCC became interested in trustee legislation reform and undertook a project to create a Uniform Trustee Act that could be enacted throughout Canada. The ULCC noted that the fundamental purposes of trustee legislation are to: [20]

- Establish trustee powers which are necessary for the proper administration of trusts in situations where powers are not adequately enabled by the trust instrument; and
- Describe court authority to direct trustees and otherwise intervene if necessary to ensure trusts function properly.

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[17] *Rules of Court Statutes Amendment Act, 2009*, SA 2009, c 53, s 180.

[18] *Wills and Succession Act*, SA 2010, c W-12.2, s 123 [*Wills and Succession Act*]. See also s 71.

[19] Ontario Law Reform Commission, *Report on the Law of Trusts*, Volumes I & II (1984); British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report 33 (2004); Uniform Law Conference of Canada, Civil Section, *Uniform Trustee Act Final Report of the Working Group*, August 2012, online: <www.ulcc.ca/en/2012-whitehorse-yk/599-civil-section-documents-2012/1254-uniform-trustee-act-final-report-of-the-working-group >[ULCC Final Report].

[20] ULCC Final Report at para 2.

[18] The ULCC found that, while trustee legislation remains important to carry out the fundamental purposes noted above, trustee statutes have become archaic and require modernization.[21]

[19] The ULCC formed a Working Group to prepare the Uniform Trustee Act. The Working Group made four general recommendations regarding trustee legislation: [22]

- Trustees should be able to act by majority;
- Where all beneficiaries are capable adults and consent, they should be able to vary and terminate the trust;
- The Uniform Act should include provisions respecting charitable trusts; and
- The rules against perpetuities and accumulations should be abolished.

[20] At the 2009 ULCC Annual Meeting, the ULCC Civil Section was asked to provide feedback on these four recommendations. The ULCC Civil Section approved the four recommendations and these principles were incorporated in the Uniform Trustee Act, 2012 [Uniform Act].[23] While the Uniform Act is largely based on British Columbia Law Reform Commission's Report, its provisions are intended to be suitable for enactment across Canada.[24]

[21] The Uniform Act is intended to be a modern statute that addresses the administration of trusts. With certain enumerated exceptions outlined in the Uniform Act, the provisions only apply when a trust instrument fails to make other provisions or is silent on a matter.[25]

[22] On June 5, 2015 the Trustee Act received royal assent in New Brunswick.[26] This recent *Trustee Act* is based on the Uniform Act.

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[21] ULCC Final Report at para 4.

[22] ULCC Final Report at paras 10-11.

[23] ULCC Final Report at para 11.

[24] ULCC Final Report at para 1.

[25] ULCC Final Report at 12-13.

[26] Trustee Act, SNB 2015, c 21 [not yet in force].

3. REFORM IN ALBERTA

[23] The creation of the Uniform Act presented Alberta with an excellent starting point for trustee legislation reform. Representatives from Alberta participated in the Working Group from its inception. In June 2013, the ALRI Board of Directors initiated a project in relation to implementation of the Uniform Act in Alberta.

[24] As noted, the Uniform Act is a Canadian uniform initiative and addresses many of the issues that Alberta and other commonwealth jurisdictions face in the law of trusts. By basing new trustee legislation on the Uniform Act, Alberta would be demonstrating leadership in terms of the implementation and analysis of the Uniform Act. Further, uniform, or at least similar, trustee legislation throughout Canada facilitates mobility and fosters certainty in the law.

[25] Although the Uniform Act is good base legislation, ALRI recognizes it must be enhanced, tailored, and clarified to reflect Alberta's particular needs.

C. Guiding Principles and Values

[26] ALRI has been guided by the following principles and values.

1. PURPOSE

[27] Trustee legislation should fulfil the purposes identified by the ULCC. Specifically, it should:

- Establish trustee powers which are necessary for the proper administration of trusts in situations where powers are not adequately enabled by the trust instrument; and
- Describe court authority to direct trustees and otherwise intervene if necessary to ensure trusts function properly.

[28] By fulfilling these purposes, trustee legislation creates a new hierarchy. First, the trust instrument governs. This gives the settlor great power to deal with his or her property as he or she sees fit. Next, the trustee legislation sets out clear and specific trustee powers and duties. This allows the trustee to administer the trust even when a trust instrument does not provide specific, or any, guidance. Finally, if neither the trust instrument nor the legislation can provide guidance in particular situations, the court can intervene.

2. MODERNITY

[29] Trustee legislation should be modern and reflect good trust practice. The current *Trustee Act* is antiquated and does not encompass all that is involved in good trust practice. There has never been a comprehensive review or overhaul of the Alberta *Trustee Act*.

3. CERTAINTY

[30] Trustee legislation should facilitate the creation of trusts that comply with the three certainties. Trustee legislation should enable the creation of a trust by a settlor. Further, it should ensure trusts that are created have clearly determined or determinable beneficiaries. It is also important for modern trustee legislation to ensure that it is possible to clearly determine the property to which the trust relates and each beneficiary's share of that property.

4. CLARITY

[31] Trustee legislation should be clear, easy to understand and plainly describe a trustee's duties and powers. There should be very little need for court interpretation of the provisions in the Act.

D. Scope of the Report

[32] ALRI's investigation concerning how the Uniform Act could be used to modernize Alberta's trustee legislation started with a section by section comparison between the Uniform Act and Alberta's *Trustee Act*. The purpose of this exercise was to identify major policy differences, changes to the common law and new concepts reflected in the Uniform Act. The second part of the review identified *Trustee Act* sections that have no equivalent in the Uniform Act.

[33] The investigation resulted in a number of significant questions which were organized by topic to facilitate discussion and develop recommendations for implementing the Uniform Act in Alberta. An Advisory Committee was assembled to assist ALRI with the questions that arose and the associated policy issues. The Advisory Committee consisted of leading trust law practitioners in Alberta who provided practical advice and inimitable feedback during the creation of the working papers, which eventually formed the basis for this Report.

[34] The major policy topics and associated issues discussed by the Advisory Committee were:

- Should trustee legislation apply to personal representatives, constructive trusts, trusts implied by law and statutory trustees?
- How should a trustee carry out duties and responsibilities?
- How should a trustee administer and distribute trust property?
- How should a trustee be held accountable to others? How should a trustee be compensated?
- What roles, if any, should the court, the Public Trustee, or other government offices play in a trust relationship?
- How should trustee legislation apply to charitable and purpose trusts?

E. General Recommendation

[35] On balance, Alberta trustee legislation should conform to the Uniform Act when appropriate. While uniformity and consistency of trust law throughout Canada is an important and laudable goal, ALRI recognizes that the provisions in the Uniform Act must be tailored to reflect Alberta law, policy, and practice. Some departure from the Uniform Act will be necessary to best reflect circumstances in Alberta.

[36] After reviewing and comparing the Uniform Act and the *Trustee Act* it also became clear that there are certain provisions in the *Trustee Act* that are not specifically addressed in the Uniform Act. ALRI is of the opinion that many of these *Trustee Act* provisions are no longer needed in modern trustee legislation, either because they are provided for generally in new provisions or because they are simply unnecessary in modern legislation.[27] Other provisions of the Trustee Act are appropriate to retain.

[37] To be clear, the general and default rule is to adopt the Uniform Act unless otherwise provided. This Report does not include recommendations to address every section of the Uniform Act. Rather, specific recommendations are

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[27] The specific *Trustee Act* provisions ALRI recommends not be included in new legislation are: sections 18 and 19 [purchase and sale], section 20 [conveyances by married women], section 22 [receipts effectual discharge], section 28 [executors and trustees acting together], section 30 [powers of attorney], and section 31 [trustee of grain-growing property].

made: (1) to highlight significant policy changes for Alberta and (2) where ALRI is of the view that there is a policy basis to depart from the Uniform Act. ALRI welcomes comments on any matters raised by this report and not just those covered by the proposed recommendations.

RECOMMENDATION 1

The new Act should adopt the Uniform Act. However, specific provisions contained in the Uniform Act should be modified, or existing Alberta provisions included, to reflect Alberta trust law and best practice.

F. Report Plan

[38] This Report generally follows the order of the Uniform Act. First, there is a general policy discussion on broad issues that arose during the project that do not neatly fit within the discussion of one particular section or area. Next the Report looks at the general application of proposed trustee legislation in Alberta. The Report then follows the order of the Uniform Act and each Part and Division is discussed in its own chapter.

[39] As already indicated, this Report adopts a default rule which provides that unless otherwise stated, the Uniform Act provisions should be adopted. Where changes are recommended to the Uniform Act provisions, or when certain Uniform Act provisions should not be included, this will be clearly identified and discussed in the Report.

[40] Finally, ALRI has included sample draft legislation in the Appendix with the goal of facilitating discussion of the proposed changes. The sample draft identifies whether a particular provision is based on the Uniform Act or the *Trustee Act* and makes note of key changes.

G. Drafting Points

[41] While the default rule adopted in this Report is to adopt the Uniform Act, several revisions have been proposed to clarify the wording of Uniform Act provisions. Similarly, when bringing forward provisions from the *Trustee Act*, it has been necessary to update their style to reflect that of the Uniform Act. For the most part these changes are insignificant but the following are of note.

Application of the Act

[42] The approach of the Uniform Act is to combine most of the exceptions to the Act's application in section 2. While this has the value of listing all the exceptions clearly, it is difficult for the reader to recall where the exceptions were in moving through the Act.

[43] The approach adopted in the sample draft legislation is to specify any exceptions in the relevant section. Section 2 of the Uniform Act has also been split into several sections to make its content clearer to the reader.

Applications to the court

[44] The Uniform Act includes numerous sections that refer to court applications. Section 85 of the Act purports to be a default provision that provides a list of parties that can bring applications, subject to sections of the Act that specify their own applicants. Despite being a default provision, section 85 actually applies to very few of the provisions dealing with court applications in the Uniform Act. Instead most of the provisions that refer to court applications include a subsection setting out who can bring applications under that particular provision.

[45] Due to the limited use of the default provision, ALRI recommends section 85 not be included in trustee legislation. Instead of including a default provision like section 85, each section that refers to court applications will instead include a subsection specifying who may apply under that particular section.

[46] Under this scheme ALRI starts from the position that most court applications under the new Act can be brought by a beneficiary or a trustee. There are then sections that narrow this default provision, for example, some court applications should only be able to be brought by a qualified beneficiary or a trustee. Further, there are other sections that expand the default provision, for example, there are some sections where there are parties in addition to a beneficiary and trustee that should be able to bring a court application.

[47] Having each provision specify who can bring a court application in relation to that provision is a clear and logical scheme. Anyone reading the legislation can easily tell by reading one section what that section is about, who can bring the relevant application and how. There is no need to look to another section, or Part, of the new Act for information on who can bring particular applications.

Role of the Public Trustee and Attorney General

[48] The *Trustee Act* does not identify or specify any particular roles for the Public Trustee or Attorney General in the administration of trusts. In contrast, the Uniform Act recognizes that the Public Trustee and Attorney General are generally responsible for, and should be involved in, trust relationships where the beneficiaries lack competency. The Public Trustee and Attorney General would also have a role in the case of charitable trusts and purpose trusts.

[49] Many sections of the Uniform Act refer to the Public Trustee or the Attorney General:

- Section 5(1)(b) makes the Public Trustee the designated person of last resort for the purposes of non-judicial appointment of substitute trustees;
- Section 13(b) contemplates that the Public Trustee would be the person to whom a trustee could submit his or her resignation if there is no one named in the trust instrument for the purpose of appointing a substitute trustee and no other trustees;
- Section 27(6) adds the Public Trustee and Attorney General to the list of persons who may apply to the court to vary an original order authorizing a trustee to act despite a conflict of interest;
- Section 46 provides that a trustee can transfer money or securities to the Public Trustee if a minor or incompetent individual does not have a guardian; and
- Section 61 describes a role for the Public Trustee and Attorney General in the matter of court approval of variations to trusts.

[50] In Alberta, the *Public Trustee Act* describes the authority and responsibilities of the Public Trustee in the general context of public trustee functions and in the specific context of minors.[28] The overall mandate of the Public Trustee is less clear than it used to be given recent changes to the *Public Trustee Act*, the transfer of responsibility for the Office of the Public Guardian and Trustee to the Human Services Ministry, and provisions contained in other statutes, in particular, the *Adult Guardianship and Trusteeship Act* and the *Estate Administration Act*.

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[28] *Public Trustee Act*, SA 2004, c P-44.1, ss 5, 6, 17, 20, 21.

[51] It is also relevant to note that Alberta legislation now adopts the title "Minister of Justice" in place of Attorney General. While the office of Attorney General still exists (and is held by the Minister of Justice) it may not be appropriate in all circumstances to use Minister of Justice where the Uniform Act says Attorney General.

[52] Given that matters relating to government involvement in protecting or enforcing beneficial interests in trust property may now be divided across two ministries, ALRI adopts the phrase "appropriate government office" for use as a placeholder in the sample draft legislation. The decision regarding which office is most appropriate in specific circumstances should be left to government.

CHAPTER 2
General Policy Discussions

[53] Several important topics arose during the review of the Uniform Act that do not fit neatly within the discussion of one particular section of trustee legislation. These broader topics are discussed below.

A. Two-Tiered Standard of Care for Trustees

[54] Under the *Trustee Act* all trustees are subject to the same standard of care; that is, all trustees must exercise reasonable skill and prudence.[29] The Uniform Act introduces a two-tiered standard of care.

[55] Uniform Act section 26(1) specifies a general standard of care which includes good faith, compliance with trust terms and acting in the best interest of trust objects.[30] Section 26(2) stipulates that trustees must exercise ordinary care, diligence and skill when dealing with trust property. Section 26(3) sets a higher standard of care for professional trustees.

[56] The ULCC commentary on Uniform Act section 26 provides, that the primary obligation of all trustees is good faith, with duties carried out in accordance with a standard of ordinary, prudent care. There is no difference between the *Trustee Act* standard and the general standard put forward in the Uniform Act. Uniform Act section 31(1) affirms that the standard of care "in

---

[29] *Trustee Act* states:

> **Trustee liability**
>
> **4(1)** A trustee is not liable for a loss in connection with the investment of trust funds that arises from a decision or course of action that a trustee exercising reasonable skill and prudence and complying with section 3 could reasonably have made or adopted.

[30] Uniform Act states:

> **Duty of care**
>
> **26(1)** In the administration of a trust, a trustee must act in good faith and in accordance with the following:
>
> (a) the terms of the trust;
>
> (b) the best interests of the objects of the trust;
>
> (c) this Act.
>
> **(2)** Subject to section 31, in the performance of a duty or the exercise of a power, whether the duty or power arises by operation of law or the trust instrument, a trustee must exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> **(3)** Despite subsection (2) but subject to section 31, if, because of a trustee's profession, occupation or business, the trustee possesses or ought to possess a particular degree of care, diligence and skill that is relevant to the administration of the trust and is greater than that which a person of ordinary prudence would exercise in dealing with the property of another person, the trustee must exercise that greater degree of care, diligence and skill in the administration of the trust.

investing trust property" for a non-specialist trustee is the "care, diligence and skill that a prudent investor would exercise."[31] For a professional trustee, however, section 31(2) stipulates a "greater degree of care, diligence and skill."

[57] Adding a second standard to the trustee legislation as contemplated in Uniform Act section 26(3) would change the law such that some Alberta trustees would be required to demonstrate greater care, diligence and skill. According to the ULCC comments, the change reflects how modern trusts operate. In particular, professional trustees claim to have special skills and are hired for a fee to administer estates and trusts. The ULCC argues that the higher standard is needed to protect the public interest. In the ULCC's view, any trustee who brings, or should bring, special knowledge and skill to the performance of his or her trustee duties, should be held to a higher standard, regardless of whether the trustee actually claims greater expertise.

[58] In general, professional trustees are already held to a higher standard than lay persons. A differential standard has been applied by the courts for some time, despite the fact that there is only one standard expressed in legislation. Trustee legislation should clarify these expectations. Setting a higher standard for professionals in trustee legislation clearly communicates that those who put themselves forward as professionals are expected to do better.

[59] Trust companies are comfortable with the higher standard, as are lawyers and accountants who provide services to trusts. The ULCC comments note that professional trustees would include those who manage commercial and business trusts. In addition, a higher standard of care is imposed on professionals under Alberta's recently enacted estate administration legislation.[32] Since trusts and estate administration are related areas of law, the governing statutes should be consistent wherever possible.

[60] As to whether a two-tiered standard might cause professional trustees to add layers of diligence or administrative activity, and the associated additional

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[31] Uniform Act states:

> **Standard of care**
>
> **31(1)** In investing trust property, a trustee must exercise the care, diligence and skill that a prudent investor would exercise in making investments.
>
> **(2)** Despite subsection (1), if, because of a trustee's profession, occupation or business, the trustee possesses or ought to possess a particular degree of care, diligence and skill that is relevant to the investment of trust property and is greater than that which a prudent investor would exercise in making investments, the trustee must exercise that greater degree of care, diligence and skill in investing trust property.

[32] *Estate Administration Act*, SA 2014, c E-12.5, s 5(3) [*Estate Administration Act*].

costs that may make it more difficult for clients to deal with them, this will be worked out on a case by case basis. Clients are generally not keen to pay for a trust company's purely self-protective activities.

[61] It is unlikely that a two-tiered system would lead to a lesser degree of conscientiousness among non-professional trustees. Further, clearly stating that the court can apply a different standard to lay trustees may encourage more non-professional trustees to take on trustee duties, knowing that they are not expected to become trust companies in order to do so.

RECOMMENDATION 2

The new Act should adopt the standards of care as proposed in Uniform Act sections 26 and 31 including the higher standard of care set out for professional trustees.

B. Prudent Investor Rule

[62] Uniform Act section 30 sets out a brief general statement of a trustee's investment powers.[33] The Uniform Act stands in contrast to *Trustee Act* section 3, which is much more comprehensive in explaining a trustee's powers and duties of investment. The difference between the *Trustee Act* and the Uniform Act raises several issues.

[63] *Trustee Act* section 3 is commonly referred to as "the prudent investor rule."[34] It is a key informational component of the Act and is crucial in assessing

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[33] Uniform Act states:

> **Investment of trust property**
>
> **30(1)** A trustee may invest trust property in any form of property in which a prudent investor might invest, including a security issued by a mutual fund as defined in the [*name of statute in jurisdiction regulating securities*].

[34] *Trustee Act* states:

> **Powers and duties with respect to investment**
>
> **3(1)** A trustee may invest trust funds in any kind of property if the investment is made in accordance with this section.
>
> **(2)** A trustee must invest trust funds with a view to obtaining a reasonable return while avoiding undue risk, having regard to the circumstances of the trust.
>
> **(3)** A trustee must review the trust investments at reasonable intervals for the purpose of determining that the investments continue to be appropriate to the circumstances of the trust.
>
> …
>
> **(5)** Without restricting the matters that a trustee may consider, in planning the investment of trust funds a trustee must consider the following matters, insofar as they are relevant to the circumstances of the trust:
>
> (a) the purposes and probable duration of the trust, the total value of the trust's assets and the needs and circumstances of the beneficiaries;
>
> (b) the duty to act impartially towards beneficiaries and between different classes of beneficiaries;
>
> *Continued*

trustee liability. For example, *Trustee Act* section 4 states that a trustee will not be liable for investment losses if the trustee made decisions that demonstrated "reasonable skill and prudence" in complying with section 3.

[64] Although the Uniform Act provides a detailed scheme in Part 4 for how a trustee should carry out administrative, investment and other duties, it does not specify what constitutes prudent behaviour on the part of a trustee.

[65] The issue is whether trustee legislation should retain the clearly articulated expression of the prudent investor rule in the *Trustee Act* or implement the more general Uniform Act provision.

[66] The factors in *Trustee Act* section 3 that describe prudent behaviour are relatively clear and have worked well in practice since the prudent investor rule was adopted. The current Alberta factors should be included in trustee legislation to provide consistent, clear guidance to trustees and the court.

RECOMMENDATION 3

The new Act should retain the current prudent investor rule, as expressed in *Trustee Act* section 3(2) [trustee must invest with the view of obtaining a reasonable return while avoiding undue risk], section 3(3) [trustee must periodically review the appropriateness of investments], and section 3(5) [matters that a trustee must consider when planning investments].

C. Temporary Absence or Incapacity of Trustee

[67] The *Trustee Act* does not authorize a trustee to fully delegate duties and powers to another person. The Uniform Act provides two mechanisms by which a trustee may authorize someone to perform trustee powers and duties in his or

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(c) the special relationship or value of an asset to the purpose of the trust or to one or more of the beneficiaries;

(d) the need to maintain the real value of the capital or income of the trust;

(e) the need to maintain a balance that is appropriate to the circumstances of the trust between
  (i) risk,
  (ii) expected total return from income and the appreciation of capital,
  (iii) liquidity, and
  (iv) regularity of income;

(f) the importance of diversifying the investments to an extent that is appropriate to the circumstances of the trust;

(g) the role of different investments or courses of action in the trust portfolio;

(h) the costs, such as commissions and fees, of investment decisions or strategies;

(i) the expected tax consequences of investment decisions or strategies.

her stead for relatively short periods of time. Specifically, Uniform Act section 8 allows a trustee to appoint a temporary substitute trustee, while section 50 permits a trustee to delegate by way of power of attorney.

[68] The primary issue under this topic is how to identify and clarify a way for a trustee to temporarily step away from duties and responsibilities without requiring a permanent replacement.

1. TEMPORARY TRUSTEE

[69] Uniform Act section 8 allows a trustee to step away from the administration of the trust for a period of time due to temporary absence or incapacity.[35] Section 8 allows a designated person to authorize a continuing or substitute trustee to perform all or part of the original trustee's administrative duties while the original trustee is unable to do so. A designated person includes any trustee. Section 8 does not set a limit on the time that a temporary trustee can perform trustee duties.

2. DELEGATING TRUSTEE POWERS AND DUTIES BY POWER OF ATTORNEY

[70] Uniform Act section 50 permits a trustee to delegate by way of power of attorney.[36] Uniform Act sections 50(1)-(2) authorize a trustee to appoint a person

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[35] Uniform Act states:

> **Temporary absence or incapacity of trustee**
>
> **8(1)** This section applies if a trustee is temporarily unable to participate in the administration of the trust by reason of an absence or incapacity that does not result in the trustee ceasing to hold office under section 12 (b).
>
> **(2)** The designated person, in writing, may
>
> (a) authorize a continuing trustee, or
>
> (b) if there is no continuing trustee, appoint a person to act as a substitute trustee,
>
> for the period that the trustee is absent or incapacitated, to administer all or part of the trust or to exercise the powers or perform the duties authorized by the designated person.
>
> **(3)** The administration of the trust, exercise of powers or performance of duties by the continuing trustee or substitute trustee is deemed to be as valid as if the absent or incapacitated trustee were not absent or incapacitated and had participated in the administration of the trust, exercise of powers or performance of duties.

[36] Uniform Act states:

> **Power to delegate by power of attorney**
>
> **50(1)** A trustee may, by power of attorney, appoint an attorney to exercise any powers and perform any duties vested in the trustee, either alone or jointly with another person, for a period not longer than 12 months from the time the power of attorney is to take effect.
>
> **(2)** Subject to subsection (3), a trustee may appoint a co-trustee as attorney only if the appointment would have been reasonable and prudent if the co-trustee had not been a co-trustee.
>
> **(3)** If there are only 2 trustees of a trust and the terms of the trust specify that there must be a minimum of 2 trustees, neither trustee may appoint the other trustee as attorney.
>
> **(4)** A trustee who appoints an attorney under subsection (1) is liable for a loss arising from the acts or omissions of the attorney as if those acts or omissions were the acts or omissions of the trustee.

Continued

by power of attorney to exercise any powers and perform duties vested in the trustee for a period of up to 12 months. Section 50(3) limits the use of a power of attorney in situations where there are only two trustees, and the trust specifies there must be a minimum of two trustees at all times. In such situations, neither trustee can appoint the other as his or her attorney. Section 50(4) states that a trustee who appoints an attorney to act in his or her stead is liable for losses arising from the acts or omissions of the attorney as if the acts and omissions were done by the trustee.

[71] Uniform Act sections 50(5)-(7) describe a notice procedure that the trustee must initiate within seven days of executing a power of attorney in the event the trustee does not comply with the notice procedure, section 50(8) validates the acts of a trustee's attorney concerning a third party who deals with the attorney in good faith.

[72] Uniform Act section 49(1) states that section 49, which governs trustees' duties and liabilities in relation to the appointment and supervision of agents, does not apply to an attorney acting pursuant to a power of attorney. Further, Uniform Act section 47(4) states that if a trustee appoints an agent by way of power of attorney, the prohibition against delegation of distributive functions does not apply.

[73] The ULCC indicates that Uniform Act section 50 is intended to change the common law to allow a trustee to temporarily delegate authority by power of

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(5) Not later than 7 days after a power of attorney is executed under subsection (1), the trustee must deliver written notice in accordance with subsections (6) and (7) that an attorney has been appointed.

(6) A notice referred to in subsection (5) must be delivered to the following persons:

(a) any other trustee of the trust;

(b) a person who has the power under the trust instrument, whether alone or jointly, to appoint a new trustee;

(c) if there is no person to whom notice can be delivered under paragraph (a) or (b), the qualified beneficiaries;

(d) if there is no person to whom notice can be delivered under paragraphs (a) to (c), the [*Public Guardian and Trustee as referred to in the enacting jurisdiction*].

(7) The notice referred to in subsection (5) must include the following information:

(a) the identity of the attorney;

(b) one or more of the following:

(i) the mailing address for the attorney;

(ii) the electronic mail address for the attorney;

(iii) the fax number for the attorney;

(c) a description of the powers and duties delegated to the attorney;

(d) the reason for the appointment;

(e) the date or event on which the appointment is to take effect;

(f) the duration of the appointment.

(8) The failure by a trustee to comply with subsection (5) does not invalidate, as against a third party dealing with the attorney in good faith, any act done or document executed by the attorney.

attorney. According to the ULCC, the benefit of the change in the law is that it would allow a trustee to temporarily bow out of trustee duties for short periods without having to resign when the trustee anticipates being unable to perform duties due to illness or extended absences from the jurisdiction. Further, the ULCC notes that the power of attorney may, in some instances, be a practical alternative to the resignation or replacement processes within the Uniform Act.

[74] The ULCC indicates that there are two main risks associated with full delegation of trustee authority by power of attorney. First, trust funds could be mismanaged by an attorney. However, this risk is mitigated by Uniform Act section 50(4), which makes the trustee liable for actions of his or her attorney.

[75] Second, it is possible that a personal representative will use a power of attorney pursuant to trustee legislation to delegate authority and duties impermissibly. According to the ULCC, this risk can be mitigated if the different roles of a personal representative and a trustee are clearly delineated in succession legislation. In Alberta, however, the second risk may be genuine, given that the distinction between a personal representative and trustee is not clearly made in estate administration, trustee or other succession statutes.

[76] As discussed in more detail in Chapter 3, *Trustee Act* section 1 includes an executor, administrator or trustee of the estate of a deceased person in the definition of "trustee." The definitions of "legal representative" in section 1(g) of the *Estate Administration Act* and "personal representative" in section 1(l) of the *Surrogate Rules* use the word "or" in the lists of persons (including various trustees) who function as representatives, which would indicate that the persons are distinct.[37] However, the statutes do not explicitly state the difference between a personal representative and a trustee. Further, given that both trustees and personal representatives are fiduciaries and have similar duties of care, it is commonly assumed that a personal representative can do anything that trustees can do.[38]

[77] One way to resolve this risk would be to implement Uniform Act section 2(8). This section provides that if a person is both a personal representative and a trustee with respect to all or part of the same estate, the Uniform Act does not apply in respect of a matter relating to the person in his or her capacity as

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[37] *Estate Administration Act*, s 1(g); *Surrogate Rules*, Alta Reg 130/1995, s 1(l) [*Surrogate Rules*].

[38] See Alberta Law Reform Institute, *Estate Administration*, Final Report 102 (2013) at paras 33-35, online: < www.alri.ualberta.ca/docs/FR_102_estate_administration.pdf>.

personal representative. Uniform Act section 2(8) is discussed in more detail in Chapter 3.

[78] Finally, changing trustee legislation to allow delegation of authority by power of attorney may add to the law concerning what may be "lawfully" done by an attorney.[39]

3. APPLICATION IN ALBERTA

[79] In general, Uniform Act sections 8 and 50 are meant to provide maximum flexibility to a trustee when carrying out the trust. Similarly, Uniform Act section 7 is included as a last resort. It permits a sole or last remaining trustee to execute a document naming a replacement in the event the trustee dies or becomes incapacitated and it is not otherwise possible to appoint a new trustee.

[80] Contrasting Uniform Act sections 8 and 50 highlights the question of whether a person temporarily serving as trustee should be permitted to exercise both administrative and distributive powers. At a minimum, trustee legislation should clearly specify the two types of trustee powers that may be delegated on a temporary basis, that is administrative and distributive powers. It may also be helpful for the legislation to indicate that distributive functions include an exercise of discretion. In addition, the specific nature of the authority given to a particular temporary trustee should be clearly spelled out at the time the temporary trustee is appointed or authorized.

[81] The authority of a temporary trustee, similar to any other agent, could be limited to performance of administrative duties and powers only. However, a trustee facing a known and relatively short term situation of incapacity, either health or residency related, should be allowed to delegate all authority to ensure that trustee functions continue to be executed without interruption.

[82] As a practical matter, it is important for a trustee who may be in the United States for extended periods of time to be able to turn over total control

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[39] *Powers of Attorney Act*, RSA 2000, c P-20, [*Powers of Attorney Act*] sets out what may be lawfully done by an attorney.

> **Authority of attorney**
>
> 7 Subject to this Act and any terms contained in an enduring power of attorney, an attorney
>
> (a) has authority to do anything on behalf of the donor that the donor may lawfully do by an attorney, and
>
> (b) may exercise the attorney's authority for the maintenance, education, benefit and advancement of the donor's spouse, adult interdependent partner and dependent children, including the attorney if the attorney is the donor's spouse, adult interdependent partner or dependent child.

and authority while out of the country so that the trust does not become non-resident in Canada according to the new residency test.[40] Any risks associated with full delegation of trustee duties and powers, as contemplated by Uniform Act section 50, would be tempered by the time limit, the ability of the original trustee to step back into the role when capable of doing so, and the provision that makes the original trustee liable for the acts of his or her attorney.

[83] Another way to fully authorize a replacement trustee would be to simply appoint a new trustee. Although the new trustee method is a viable option, it may be inefficient and undesirable for a trustee to resign in the face of a relatively temporary incapacity, especially since trusts can run for long periods of time.

[84] An important issue to consider is how the uniform proposal to permit a trustee to delegate by power of attorney might affect what an attorney is currently authorized to do. In particular, although an attorney can do whatever a natural person can do, it is not clear whether a trustee's powers as a trustee are natural. Further, an attorney exercises power and authority in accordance with the law, which would include trustee legislation. As a result, the *Powers of Attorney Act* might need to be specifically modified.

[85] Moreover, the *Powers of Attorney Act* deals with authority concerning the donor's property and has its own rules about how an attorney should seek advice of the court when managing the donor's property. Permitting a trustee to delegate powers and duties to an attorney by way of enduring power of attorney is not really the same type of thing. Therefore, it may be difficult to determine whether the temporary trustee appointed by power of attorney is governed by the *Powers of Attorney Act*, trustee legislation or both. Ultimately, implementing Uniform Act section 50 would require further analysis as to the effect on the *Powers of Attorney Act* and identification of specific changes that need to be made. Given these uncertainties, it is not recommended that trustees be able to delegate trust powers by power of attorney.

4. RECOMMENDED PROVISION

[86] As proposed, Uniform Act section 50 provides more flexibility than Uniform Act section 8 as an additional tool in the trustee kit, but it also raises

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[40] In *Fundy Settlement v Canada*, 2012 SCC 14, the Supreme Court of Canada held that for the purposes of the *Income Tax Act*, a trust resides in the location where the central management and control of the trust occurs. This location may or may not be the same as the residence of the trustee.

more concerns and cautions. It is confusing to have both sections included in trustee legislation to solve what is essentially the same problem. In this regard, it should be noted that people often only look as far as the first option in the legislation. The two uniform sections should be combined.

[87] The resulting provision should make it clear that administrative and distributive functions can be delegated to another person to ensure a trustee who wants to delegate considers exactly what will be delegated. If the decision is to delegate everything, that decision should be clearly outlined.

[88] It is important that the delegation of trustee duties and powers be temporary. However, the 12 month period is an arbitrary guideline that may not be useful in practice. The 12 month period should be replaced with the requirement that the delegation be made for a specified period of time. For simplicity, ALRI recommends calling a temporary substitute trustee simply a "temporary trustee" and this language is found in the sample draft Act.

[89] Finally, the resulting provision should indicate that the trustee will be resuming his or her role as trustee at the end of the specified time period and that the concept of notice as reflected in Uniform Act section 50 is important in the temporary trustee context. In this regard, if a trustee delegates any or all powers, that fact should be very clear to the substitute trustee and to everyone, especially beneficiaries, who will be dealing with the substitute trustee.

RECOMMENDATION 4

The new Act should authorize a trustee to delegate to another person, for a specified period of time, the authority to administer all or part of the trust or to exercise some or all of the trustee's powers, including distributive powers, or to perform some or all the trustee's duties.

RECOMMENDATION 5

In the event that a trustee is unable to act by reason of temporary absence or incapacity that does not result in the trustee ceasing to be a trustee, the new Act should authorize a designated person to authorize a person, for a specified period of time, to administer all or part of the trust or to exercise some or all of the trustee's powers, including distributive powers, or to perform some or all the trustee's duties.

RECOMMENDATION 6

Under the new Act, the trustee should resume his or her role as trustee at the end of the specified period.

RECOMMENDATION 7

The new Act should not provide for the delegation of trust powers by power of attorney.

D. Communication with Beneficiaries

[90] The Uniform Act introduces the concept of a qualified beneficiary. Uniform Act section 1 defines qualified beneficiary as:

- A beneficiary who has a vested beneficial interest in the trust property; or
- A beneficiary with a contingent interest who has delivered the required notice to a trustee.

[91] This concept is not included in the *Trustee Act*. The issue is whether adopting the concept of a qualified beneficiary would clarify a trustee's duty to communicate with beneficiaries.

[92] Being a qualified beneficiary does not limit a beneficiary's usual rights, such as the general right to make a court application regarding a trust matter. The qualified beneficiary concept simply expands notice and reporting requirements. The Uniform Act is carefully crafted and only uses the qualified beneficiary concept where the trustee is required:

- To give notice of conflicts of interest [Uniform Act section 27];
- To report in each fiscal period [Uniform Act section 28]; and
- To give notice of trustee compensation [Uniform Act section 65].

The receipt of notice or reports typically allows the qualified beneficiary to respond, object or take further steps as follow up. A qualified beneficiary may also bring an application for passing accounts under Uniform Act section 67.

[93] The ULCC commentary indicates that it is important for a beneficiary with a contingent interest to notify the trustee if he or she wishes to receive notices and reports. A contingent beneficiary may choose not to give such notice to the

trustee. Without notice, a trustee need only automatically provide annual reports to beneficiaries with vested beneficial interests.

[94] In general, implementing the qualified beneficiary concept supports the policy goal of transparent trust administration by facilitating a broader distribution of information to beneficiaries. In particular, the Uniform Act provisions clarify that a trustee has a duty to account and provide information to various types of beneficiaries without giving a qualified beneficiary new control over, or special access to, the information that a trustee provides. However, the concept of a qualified beneficiary would be easier to understand if it were contained in a single definition provision, rather than split between one provision at the beginning of the Act and one at the end.

RECOMMENDATION 8

The new Act should clarify the trustee's responsibility to communicate with beneficiaries by adopting the concept of a qualified beneficiary as proposed in Uniform Act sections 1 and 101. The new Act should consolidate the qualified beneficiary definition into one, unified provision.

E. Rule Against Perpetuities

[95] The ULCC Working Group on the Uniform Trustee Act recommended the rule against perpetuities be abolished. The ULCC approved this recommendation and the Uniform Act abolishes the rule against perpetuities. The ULCC based this recommendation on earlier reforms introduced in Manitoba and Saskatchewan.

[96] The ULCC takes the view that the harm meant to be cured by perpetuity rules is better addressed by way of legislation that allows for the variation of trusts, rather than by the rule against perpetuities.[41]

[97] Pursuant to the *Perpetuities Act*, the rule against perpetuities still applies in Alberta.[42] ALRI determined that the issue of perpetuities reform extends beyond the compass of this current project. The consideration of whether or how to reform perpetuities is best dealt with in a separate project from the review of the Uniform Trustee Act and ALRI has undertaken a project to do so. Accordingly,

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[41] ULCC Final Report at para 34.

[42] *Perpetuities Act*, RSA 2000, c P-5.

this Report for Discussion does not include any discussion of the rule against perpetuities or matters that are dealt with by the *Perpetuities Act*. Specifically, *there is no discussion of Uniform Act sections 76 and 87-93.*

CHAPTER 3
Definitions and Application

A. Definitions

[98] The Uniform Act sets out several definitions. The definitions can be grouped into three categories: those that repeat certain definitions in the *Income Tax Act (Canada)*, those that operate only within the Uniform Act and those that need to be crafted to reflect the laws in Alberta.

1. DEFINITIONS FROM THE *INCOME TAX ACT (CANADA)*

[99] The Uniform Act adopts the following definitions from the *Income Tax Act (Canada)*:[43]

> "alter ego trust" has the same meaning as in the *Income Tax Act* (Canada)
>
> "joint spousal or common-law partner trust" has the same meaning as in the *Income Tax Act* (Canada)
>
> "post-1971 spousal or common-law partner trust" has the same meaning as in the *Income Tax Act* (Canada)
>
> "pre-1972 spousal trust" has the same meaning as in the *Income Tax Act* (Canada)

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[43] *Income Tax Act* (Canada), RSC 1985, c 1 (5th supp) states:

> **Definitions**
>
> **108(1)** In this subdivision,
>
> "pre-1972 spousal trust" at a particular time means a trust that was
>
> (a) created by the will of a taxpayer who died before 1972, or
>
> (b) created before June 18, 1971 by a taxpayer during the taxpayer's lifetime
>
> that throughout the period beginning at the time it was created and ending at the earliest of January 1, 1993, the day on which the taxpayer's spouse or common-law partner died and the particular time, was a trust under which the taxpayer's spouse or common-law partner was entitled to receive all of the income of the trust that arose before the spouse's or common-law partner's death, unless a person other than the spouse or common-law partner received or otherwise obtained the use of any of the income or capital of the trust before the end of that period;
>
> ...
>
> **Definitions**
>
> **248(1)** In this Act,
>
> "alter ego trust" means a trust to which paragraph 104(4)(a) would apply if that paragraph were read without reference to subparagraph 104(4)(a)(iii) and clauses 104(4)(a)(iv)(B) and (C);
>
> "joint spousal or common-law partner trust" means a trust to which paragraph 104(4)(*a*) would apply if that paragraph were read without reference to subparagraph 104(4)(*a*)(iii) and clause 104(4)(*a*)(iv)(A);
>
> "post-1971 spousal or common-law partner trust" means a trust that would be described in paragraph 104(4)(*a*) if that paragraph were read without reference to subparagraph 104(4)(*a*)(iv).

2. DEFINITIONS THAT OPERATE WITHIN THE UNIFORM ACT

[100] The Uniform Act adopts the following definitions:

"fiscal period", in relation to a trust, means the following:

(a) the period identified in the trust instrument as the period adopted for accounting purposes;

(b) if paragraph (a) does not apply, the period specified by the trustee as the period adopted for accounting purposes;

(c) if paragraphs (a) and (b) do not apply, the calendar year.

"objects", in relation to the objects of a trust, means beneficiaries or purposes;

"qualified beneficiary", in relation to a trust, means a beneficiary who

(a) has a vested beneficial interest in the trust property, or

(b) has delivered notice to a trustee under section 101(1) and has not withdrawn the notice under section 101(2);

"secured party" means a person who has a security interest;

"security interest" means an interest in property that secures payment or performance of an obligation;

"settlor", in relation to a trust created by a will, includes a testator;

"transfer", in relation to property, means to transfer by any method, including

(a) to assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest or release, or

(b) to agree to do any of the things referred to in paragraph (a);

"trust instrument" means any of the following that create or vary a trust:

(a) a deed, will or other legal instrument;

(b) an enactment, other than this Act;

(c) an oral declaration,

but does not include a judgment or an order of a court of competent jurisdiction;

"vest" includes to vest by means of any of the following:

(a) an order of a court of competent jurisdiction;

(b) the terms of a trust instrument or other legal instrument;

(c) the operation of section 21(1) or (3).

[101] Aside from the concept of qualified beneficiary, which was discussed in Chapter 2, the definitions do not raise significant policy issues.

3. DEFINITIONS TO REFLECT ALBERTA LAW

[102] The Uniform Act also includes two definitions that need to reflect the context of Alberta law.

[103] The first definition is "court." The appropriate reference to include in the definitions is the Court of Queen's Bench:[44]

> "court", except in reference to a court of competent jurisdiction, means the Court of Queen's Bench.

[104] The second definition is "incapacitated person." The *Adult Guardianship and Trusteeship Act* uses the more modern term "represented adult."[45] Both the *Public Trustee Act* and the *Estate Administration Act* adopt this term with regard to adults who lack appropriate capacity. However, both of these Acts also carry forward the older concept of an "incapacitated person" from the former *Dependent Adults Act*.[46] A definition of "incapacitated person" is carried forward

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[44] See *Judicature Act*, RSA 2000, c J-2; *Court of Queen's Bench Act*, RSA 2000, c C-31, s 1; *Interpretation Act*, RSA 2000, c I-8, s 28.

[45] *Adult Guardianship and Trusteeship Act* states:

> **Definitions**
>
> 1 In this Act
>
> (hh) "represented adult" means an adult in respect of whom
>
> (i) a guardianship order is in effect,
>
> (ii) a trusteeship order is in effect, or
>
> (iii) both a guardianship order and a trusteeship order are in effect.

[46] *Public Trustee Act* states:

> **Definitions**
>
> 1 In this Act
>
> (j) "represented adult" means
>
> (i) a represented adult as defined in the *Adult Guardianship and Trusteeship Act*, and
>
> (ii) an incapacitated person.

Estate Administration Act states:

> **Definitions**
>
> 1 In this Act.
>
> (j) "represented adult" means
>
> (i) a represented adult as defined in the *Adult Guardianship and Trusteeship Act*, or
>
> (ii) an incapacitated person as defined in the *Public Trustee Act*;

in the *Public Trustee Act*.[47] It is likely that both terms will be required for some time into the future. Accordingly, the appropriate definition to replace "incapacitated person" is:

> "represented adult" means
> (i) a represented adult under the *Adult Guardianship and Trusteeship Act* or
> (ii) an incapacitated person under the *Public Trustee Act*.

B. Application of Act

1. TEMPORAL APPLICATION: WHEN WAS TRUST CREATED?

[105] Uniform Act section 2(1) provides that new trustee legislation will generally apply to all trusts whether they were created before or after the legislation comes into force.

[106] Section 2(2) identifies specific sections that have their own particular rules for coming into force. Given the technical nature of these coming into force provisions they are not discussed in detail in this Report. However, ALRI will address the question of coming into force after consultation and before issuing a final report.

[107] Many of the Uniform Act provisions are procedural. The general rules of statutory interpretation for procedural legislation provide a presumption at common law that procedural enactments have immediate application to ongoing and future events.[48]

[108] As noted earlier, however, exceptions to the temporal application of the Act will be set out within the relevant provisions.

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[47] *Public Trustee Act* states:

> **Definitions**
>
> **1** In this Act
>
> (a) "certificate of incapacity" means a certificate of incapacity continued under section 47(1);
>
> ...
>
> (f) "incapacitated person" means a person who is the subject of a certificate of incapacity that is in effect;
>
> **Certificates of incapacity**
>
> **47(1)** Subject to subsection (9), a certificate of incapacity issued or deemed to have been issued pursuant to the *Dependent Adults Act*, RSA 2000 cD-11, that was in effect immediately before the coming into force of this subsection continues in effect under this Act.

[48] Ruth Sullivan, *Sullivan on the Construction of Statutes, 5th ed* (Markham: LexisNexis Canada, 2008) at 696.

2. APPLICATION TO SPECIFIC TYPES OF TRUST

a. Implied, resulting and constructive trusts

[109] The *Trustee Act* defines "trustee" as a trustee of an express trust as well as a trustee whose trust arises by construction or implication of law.[49] The *Trustee Act* applies to constructive trusts and has been relied on to resolve disputed matters involving a constructive trust in at least one case. [50]

[110] In contrast, the Uniform Act does not apply to trustees of trusts that arise by construction or implication of law. Specifically, Uniform Act section 2(3) states that, except for Part 9, which deals with perpetuities and accumulations, the Uniform Act does not apply to implied trusts, resulting trusts, constructive trusts or trusts arising by operation of law other than an enactment.

[111] The issue is whether trustee legislation should apply to trusts that arise by construction or implication of law.

[112] The ULCC comments on the Uniform Act indicate that trusts that arise by construction or operation of law other than enactment lack express intent and occur in specific situations to resolve matters of unfairness, injustice, or to provide a remedy to a deserving party. According to the ULCC, it would be inappropriate for the general trustee legislation to apply to these trust situations.

[113] ALRI agrees with the ULCC commentary regarding Uniform Act section 2(3). Further, some of these trusts are remedial and do not arise until there is a court order. It would be particularly inappropriate for trustee legislation to apply retroactively to trust property in the case of a remedial situation.

RECOMMENDATION 9

The new Act should not apply to implied, resulting or constructive trusts or to any other trust that arises by operation of law as proposed in Uniform Act section 2(3).

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[49] *Trustee Act* states:

Definition

1 In this Act, "trustee" includes ...
(b) a trustee whose trust arises by construction or implication of law as well as an express trustee.

[50] In *Alberta Teachers' Assn v Calgary Board of Education*, 2006 ABQB 171, the Calgary Board of Education (having incurred legal expenses to establish a constructive trust) was successful on an application for costs, relying on the *Trustee Act* section 44.

b. Trusts arising by enactment

[114] The *Trustee Act* does not have general application to all statutory trusts and trustees unless the legislation creating the trust so provides. For example, the *Trustee Act* generally applies to trust-like relationships arising during estate administration and under the *Minors' Property Act*.[51] In particular, the *Minors' Property Act* provides that, unless the order appointing a trustee otherwise provides, the *Trustee Act* applies to the trustee and trust.[52] In other legislation, provisions of the *Trustee Act* are sometimes extended to trustees and trust-like relationships by express incorporation of specific sections of the *Trustee Act* in the other enactment. For example, the *Adult Guardianship and Trusteeship Act* states that the *Trustee Act* does not apply except as provided and then sets out a detailed scheme of which *Trustee Act* sections apply.[53]

[115] The Uniform Act establishes a broad scheme of general application in the definition of trust instrument but then largely excludes statutory trusts and trustees. Under the Uniform Act, the definition of trust instrument includes enactments other than the Uniform Act. Further, Uniform Act section 2(3), though poorly worded, states: "This Act, except Part 9 [*Perpetuities and*

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[51] The specific interaction of trustee legislation and the *Estate Administration Act* is discussed in the next section.

[52] *Minors' Property Act*, SA 2004, c M-18.1 states:

> **Application to appoint trustees**
>
> **10(7)** Except as otherwise provided by an order appointing a trustee under subsection (1), ...
>
> (b) the *Trustee Act* applies to the trustee and the trust.

[53] *Adult Guardianship and Trusteeship Act* states:

> **Application of Division**
>
> **44(2)** Except as otherwise provided by this Act, the *Trustee Act* does not apply to a trustee appointed under this Act.
>
> ...
>
> **Investments**
>
> **59(1)** Sections 2 to 8, except section 3(5)(b), of the *Trustee Act* apply to a trustee appointed under this Act, other than the Public Trustee.
>
> **(2)** Section 4(1) of the *Trustee Act* does not apply in the case of liability for loss arising from a decision or course of action by a trustee that
>
> (a) contravenes the express terms of the trusteeship order, or
>
> (b) is contrary to the express terms of a trusteeship plan approved by the Court.
>
> **(3)** A trusteeship order and any trusteeship plan approved by the Court are deemed to be an instrument creating a trust for the purposes of section 2(1) of the *Trustee Act*.

Other legislation that expressly incorporates provisions of the *Trustee Act* includes:

- *Powers of Attorney Act*, note 39, s 7.1, "Sections 2 to 8 of the *Trustee Act* apply to an attorney exercising a power of investment under an enduring power of attorney."
- *Public Trustee Act*, s 37(5), " The Public Trustee is governed by sections 2 to 8 of the *Trustee Act* when making or retaining separate investments for a client."
- *Teachers' Pension Plans (Legislative Provisions) Regulation*, AR 204/95, s 23, "The *Trustee Act*, other than sections 1, 41 and 43 of it, does not apply with respect to the Board or its members."

Accumulations], does not apply in respect of … any other trusts that arises by operation of law other than an enactment." Section 2(6) then outlines the provisions that do not apply to trusts arising by enactment:[54]

- Section 28: Duty to report to qualified beneficiary;
- Section 29: Duty to provide information;
- Part 2: Appointment and Removal of Trustees;
- Part 6: Trustee Compensation and Accounts; and
- Part 7: Charitable Gifts, Charitable Trusts and Non-Charitable Purpose Trusts

Further exceptions for trusts arising by enactment are also created by the fact that such trusts are exempted from the list of provisions in Uniform Act section 2(5) that prevail over contrary terms in the trust instrument.

[116] The issue is whether to replace the current Alberta scheme where trustee legislation applies to statutory trusts and trustees primarily by incorporation of specific provisions of trustee legislation in other legislation, with the Uniform Act scheme of general application with specific exceptions made for statutory trusts and trustees.

[117] The ULCC comments highlight that statutory trusts and trust relationships should be distinguished from private trusts. According to the ULCC, the parts and sections the Uniform Act expressly excludes for statutory trustees are those that are contextually inappropriate.

[118] Comparing what is usually incorporated by reference in other Alberta statutes governing trust like relationships to that which applies to statutory trusts under the Uniform Act, the effect is the same at a conceptual level.

[119] It is currently clear which sections of the *Trustee Act* apply and do not apply to the major statutory trust relationships by looking at the statute that gives rise to the statutory trust.

[120] The current Alberta scheme with trustee legislation applying to statutory trusts through incorporation of trustee provisions into other enactments remains

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[54] Uniform Act section 2(6) also excludes section 50 so that statutory trustees are not able to delegate functions by power of attorney. The ability to delegate by power of attorney is not recommended in this Report. See discussion in Chapter 2 under heading "Temporary Absence or Incapacity of Trustee."

the preferred approach in Alberta. Where trusts arise by enactment they are subject to the rules in the statutes which create them. This scheme also provides an advantage to the reader in having specific legislation flag when trustee legislation applies. The Uniform Act approach is less helpful in drawing trustee legislation to the reader's attention.

[121] The current Alberta scheme should continue with other enactments incorporating all or part of the trustee legislation as necessary or desired. Legislation that creates statutory trusts should specify which provisions of trustee legislation, if any, apply to statutory trusts and trustees.

RECOMMENDATION 10

The new Act should not apply to trusts that arise by enactment unless expressly incorporated into other enactments.

3. PERSONAL REPRESENTATIVES UNDER THE *ESTATE ADMINISTRATION ACT*

[122] Under the *Trustee Act* a trustee includes an executor, administrator or the trustee of the estate of a person.[55] Similarly, the *Estate Administration Act* provides that a personal representative is a trustee within the meaning of the *Trustee Act*.[56]

[123] In contrast, Uniform Act section 2(8) provides that when a person is both a trustee and a personal representative with respect to all or part of the same estate, the Uniform Act does not apply in respect of a matter relating to the person in his or her capacity as personal representative. However, it does apply to the person in his or her capacity as a trustee.

[124] The ULCC comments indicate that Uniform Act section 2(8) is intended to clarify that trustee legislation applies only to a person functioning as the trustee of a testamentary trust, but not generally to persons who are personal representatives.

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[55] *Trustee Act* states:

Definition

1 In this Act, "trustee" includes

(a) an executor, an administrator or a trustee of the estate of a person,

[56] *Estate Administration Act* states:

General duties of a personal representative

5(2) A personal representative is a trustee within the meaning of the *Trustee Act*.

[125] The main issue is whether trustee legislation should continue to apply generally to personal representatives, as under the *Trustee Act*, or should be changed as contemplated in the Uniform Act. If the Uniform Act approach is adopted, a secondary consideration is whether there are specific sections that should apply to personal representatives.

[126] The inclusion of executors and administrators in the definition of "trustee" has been part of the *Trustee Act* since Alberta was part of the Northwest Territories.[57] Originally, the law applicable to executors, administrators, trustees and others who held property on trust was all part of the former *Trustee Ordinance*. In the case of an executor named in a will, it is not difficult to find the three certainties necessary to create a private trust relationship: intent, subject matter and object. Similarly, if the testator uses a will to create an ongoing trust by transferring assets to a named trustee for the benefit of particular persons or purposes, the requirements of a trust relationship are met.

[127] In instances where a deceased person does not have a will, the rationale for finding a traditional trust relationship may be less persuasive. In particular, there is no certainty as to what the deceased person intends with respect to management, use or distribution of property. The uncertainty is resolved by statutory mechanisms. Estate administration legislation provides for someone to be appointed to administer the deceased's estate and states how property is to be used. Wills and succession legislation details how property is to be distributed among dependents and beneficiaries if there is anything remaining after the deceased's affairs are settled.

[128] Based on a survey of Alberta cases decided between 2003 and 2013, cases involving the *Trustee Act* most often involve estate administration disputes. Of these, many address whether a personal representative is entitled to compensation and, if so, how much. Some cases consider whether a personal representative has acted in a manner consistent with the duties and responsibilities of a trustee. Others deal with a personal representative's liability for financial loss.[58]

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[57] *Trustee Ordinance*, note 10, s 2.

[58] For example, in *Svoboda v Kuzel*, 2006 ABQB 916 [*Svoboda*], an administrator originally appointed as a replacement pursuant to *Trustee Act* section 14(2) and was then replaced in a proceeding brought under section 46. The administrator made an application pursuant to section 41 seeking full discharge and asked to be relieved of the possibility of future actions regarding personal liability.

[129] The differences between the roles and responsibilities of a personal representative and a private trustee are not clearly reflected in the *Trustee Act* or the *Estate Administration Act*. Uniform Act section 2(8) reflects the reality that personal representatives have different roles than trustees and is more in keeping with modern trust practice.

[130] Further, there are several provisions in the Uniform Act that should not apply to personal representatives. For example, the sections that allow a trustee to resign voluntarily, permit a majority of co-trustees to remove another trustee, and provide that trustees may act by majority are contrary to the common law as it relates to personal representatives.[59] Such matters are also governed by the *Estate Administration Act*.

[131] Another reason for distinguishing the role of personal representative from trustee is that the regulatory structures for administering estate property under the *Estate Administration Act* and the structures for administering trust property under the *Trustee Act* or the Uniform Act are very different. Nor are administrative duties and processes applicable to the administration of an estate under the *Surrogate Rules* appropriate for the administration of a trust.

[132] In the past, estate administration legislation did not fully capture all aspects of the personal representative role, such as the powers that a personal representative is authorized to exercise or the fiduciary aspects of the personal representative role. Instead, these were covered in the *Trustee Act*.

[133] Now, the *Estate Administration Act* generally enables a personal representative to carry out the fiduciary role through section 5(1) [General duties of a personal representative], section 20 [Personal representative's authority] and section 23 [Duties and liabilities of personal representatives][60]. In particular, *Estate Administration Act* section 20 seems well drafted to overcome any

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[59] See *Stordy v McGregor* (1985), [1986] 42 Man R (2d) 237 (QB); *Re Haasz*, [1959] OWN 395 (CA).

[60] *Estate Administration Act* states:

> **Personal representative's authority**
>
> **20(1)** Subject to the will, if any, and this Act or any other enactment, a personal representative has the following authority in regard to the property included in the estate of the deceased person:
>
> (a) to take possession and control of the property;
>
> (b) to do anything in relation to the property that the deceased person could do if he or she were alive and of full legal capacity;
>
> (c) to do all things concerning the property that are necessary to give effect to any authority or powers vested in the personal representative.
>
> **(2)** Any action taken, decision made, consent given or thing done by a personal representative with respect to a matter within the personal representative's authority has the same effect for all purposes as if the deceased person had taken the action, made the decision, given the consent or done the thing while he or she was alive and of full legal capacity.

deficiencies or gaps in a personal representative's power that may exist due to a poorly drafted will. Modern estate administration legislation reduces or eliminates the need to look to trustee legislation to fill the gaps.

[134] There may be some specific provisions in the Uniform Act that would be appropriate for personal representatives; for example, the provisions dealing with trustee compensation. In keeping with Recommendation 10 above, any provisions in the Uniform Act that may be appropriate for personal representatives should be specifically brought into the *Estate Administration Act* through consequential amendments.

RECOMMENDATION 11

The new Act should apply to personal representatives in their capacity as trustees; however, the new Act should not apply to personal representatives when they are acting in their capacity as personal representatives except as provided in estate administration legislation.

4. CONTRARY INTENTION EXPRESSED IN TRUST INSTRUMENT

[135] The *Trustee Act* section 2(1) provides that the investment sections of the *Trustee Act* are subject to a contrary intention expressed in a trust instrument.[61]

[136] The Uniform Act sections 2(4) and 2(5) give greater priority to the terms of a trust instrument and state that a trust instrument prevails over the entire Act, with specific exceptions. The exceptions are set out in Uniform Act section 2(5). Where an exception applies, the provisions of the Act will prevail over contrary provisions in a trust instrument.

[137] The issue is how trustee legislation should describe the balance of authority between the trust instrument and the Act. In particular, should trustee legislation change from the existing scheme that specifies the matters where the terms of a trust instrument will prevail over legislative provisions, to the Uniform Act scheme in which a trust instrument generally prevails with specific exceptions.

[138] The ULCC comments indicate that Uniform Act section 2(4) reflects the "foundational characteristic" of the legislation. In particular, the Uniform Act

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[61] *Trustee Act* states:

> **Application**
>
> **2(1)** Sections 3 to 8 are subject to a contrary intention expressed in the instrument creating a trust.

"provides for rules that apply when a trust instrument creating a trust is silent." In other words, the Uniform Act governs a trust, subject to the terms of the trust.

[139] The ULCC comments on Uniform Act section 2(5) state that the listed sections should prevail over contrary trust instrument terms because each listed section "embodies a rule considered to be of such importance that it ought not to be able to be displaced by the settlor of a trust."

[140] As noted, *Trustee Act* sections 3-8 are subject to a contrary intention expressed in a trust instrument. *Trustee Act* sections 3 to 6 apply to the investment powers and duties of trustees, trustee liability for losses to trust property, delegation of investment authority, and authorization to purchase mutual or similar types of funds. Section 7 stipulates that a trustee (unless the trustee is a corporation acting for the Teachers' Pension Plan) must, as far as practicable, ensure that records of the trustee's ownership of securities indicate the trust. Section 8 establishes the Minister's authority to enact regulations defining investments that are similar to a mutual fund and additional rules as to how a trustee can delegate authority under section 5.

[141] The balancing scheme of the *Trustee Act* appears simple. However, the sections of the *Trustee Act* that can be overridden by a trust instrument contain requirements that may not reflect modern trust administration, investment or trustee practices. As a result, much of what a modern settlor would expect a trustee to do in terms of administering trust property must be specified in the trust instrument to avoid violating the requirements of the *Trustee Act*. This is inefficient, adds complexity to the trust instrument and, in the event terms are missed in the drafting of the instrument, may unduly limit trustee power to properly administer trust property.

[142] The Uniform Act contains approximately 27 updated and detailed provisions concerning general trust administration compared to 6 in the *Trustee Act*. In particular, the Uniform Act contains provisions concerning trustee duties, investment powers, allocation of income and capital, delegation and other miscellaneous requirements. Under the Uniform Act approach, a trust instrument would not need to include these as standard trust terms. A settlor would only need to override those which he or she does not agree with.

[143] The trust instrument should generally prevail over the legislation, except in specified situations. The Uniform Act sections 2(4)-(5) reflect this principle. As noted earlier, however, exemptions to the primacy of the trust instrument are set out within the relevant sections.

RECOMMENDATION 12

The new Act should balance the authority between the trust instrument and the Act by allowing the trust instrument to prevail over the Act, with specific listed exceptions, as proposed in Uniform Act sections 2(4) and 2(5).

C. Continuation of Existing Rules

[144] The Uniform Act section 3 provides that the rules of common law and equity, except where they are inconsistent with the provisions of the Act, continue to apply. This is an appropriate provision for inclusion in trustee legislation.

D. Trust is Not a Person

[145] The Uniform Act section 4 provides that nothing in the Act makes a trust a person. The ULCC commentary notes that this section clarifies that nothing in the Act is intended or is to be construed as conferring legal personality on a trust, "which in law is a justiciable relationship of obligations and entitlements with respect to property."

CHAPTER 4

Appointment of Trustee

A. Appointment of Replacement Trustee

[146] Uniform Act sections 5, 6 and 7 contain a detailed scheme for appointing substitute trustees. These sections set out:

- Who may appoint a substitute trustee;
- The decision-making process if there are multiple persons with authority to appoint;
- Who may be appointed; and
- When a substitute trustee may be appointed.

Substitute appointments can, if necessary, be overridden by the court pursuant to other sections which authorize the court to appoint additional trustees or substitute a new trustee upon removal of a trustee who is incompetent, nonresponsive or uncooperative and whose conduct is detrimental to the trust.

[147] *Trustee Act* section 14 provides for the appointment of substitute trustees.[62] Substitute trustees can be appointed by the person authorized to appoint new trustees in the trust instrument or, if there is no such person, by the continuing trustee, the executor or administrator of the last surviving trustee, or the last retiring trustee.

[148] In order to clearly convey that a "substitute trustee" is a permanent replacement, ALRI refers to a substitute trustee as a "replacement trustee." This wording is found in both this Report and the sample draft Act in the Appendix.

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[62] *Trustee Act* states:

> **Substitute trustee**
>
> **14(1)** When a trustee dies or refuses to act or becomes incapable or unfit to act in the trusts or powers reposed in the trustee, it is lawful for the person empowered to appoint new trustees by the deed, will or other instrument creating the trust, or, if there is no such person or no such person able and willing to act, then for
>
> (a) the surviving or continuing trustee or trustees for the time being,
>
> (b) the executor or the administrator of the last surviving and continuing trustee, or
>
> (c) the last retiring trustee,
>
> to appoint in writing any other person to be a trustee in place of the trustee dying or refusing to act or becoming incapable or unfit to act.

1. WHO MAY APPOINT

[149] The ULCC comments indicate that the list of designated persons is arranged in order of priority of authority and that only one class of persons has authority at any time. If one class is unable or unwilling to designate a replacement trustee, the power passes to the next class.

[150] It is sensible for trustee legislation to clearly specify who has authority to appoint a replacement trustee. These provisions inform trustees and those who deal with trust property that it is not always necessary to go to court to get a new trustee appointed.

[151] This said, the uniform sections are confusing. The clarity of trustee legislation would be enhanced by re-ordering the scheme of designated persons set out in Uniform Act sections 5 and 7 and modified by section 6. It should be easy to discern when a replacement trustee may be appointed, who is authorized to appoint a replacement, what happens if the first person on the list does not name a replacement and who may not appoint a replacement. As currently worded, the Uniform Act does not achieve this goal.

[152] Although *Trustee Act* section 14 states who can appoint a new trustee and under what circumstances, the current legislation also directs a trustee to go to court to request release or discharge from trustee duty. In these situations, the resulting court order also identifies the new trustee. Trust companies and others are accustomed to the court naming new trustees and appreciate the clarity of court orders, especially when it comes to determining whether the old or new trustee is responsible and liable.

[153] While updated legislation detailing the authority to appoint new trustees may not completely resolve the problem of financial institutions and trust companies insisting on court orders, it may help reduce the number of applications and provide authority for the new trustee orders.

a. Beneficiary under a trust created by enactment

[154] Uniform Act section 5 includes the beneficiary of a trust created by enactment as a designated person.

[155] There is no provision in the *Trustee Act* that allows a beneficiary of a statutory trust to name a replacement trustee. This uniform provision may not be appropriate in Alberta. In particular, just because there is a beneficiary of funds held in trust under a statute does not make the party holding the funds a true

trustee. Further, matters such as the rights of beneficiaries and how trustees and replacement trustees are appointed are governed by the enactment creating the trust.

[156] Under the Uniform Act, a beneficiary under a statutory trust has the last priority to designate a replacement trustee. However, the ULCC does not include an example of when the beneficiary of a statutory trust, would have authority to name a replacement trustee. Uniform Act section 5(2)(d) should not be included as it does not reflect Alberta law.

RECOMMENDATION 13

The new Act should not provide for the beneficiary of a statutory trust to appoint a replacement trustee.

b. Sole trustee

[157] The interrelationship of Uniform Act sections 5 to 7 is circular in some instances. The complexity of the drafting can be reduced by dealing with sole and multiple trustees separately.

[158] In the instance of a sole trustee, the designated person is the first of the following persons or classes of person, proceeding in descending order, who is able and willing to act as a designated person:[63]

- The person nominated by the trust instrument for the purpose of appointing a replacement trustee would appoint a trustee [Uniform Act section 5(2)(a)];
- The person appointed in writing by the sole trustee to be a replacement trustee [Uniform Act section 7];
- The personal representative of the sole trustee [Uniform Act section 5(2)(c)];
- The appropriate government office [Uniform Act section 5(1)(b)].

c. Multiple trustees

[159] In the instance of multiple trustees, the designated person is the first of the following persons or classes of person, proceeding in descending order, who is able and willing to act as a designated person:[64]

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[63] In light of Recommendation 13, reference to the beneficiary of a trust arising by enactment is omitted.

- The person nominated by the trust instrument for the purpose of appointing a replacement trustee [Uniform Act section 5(2)(a)];
- The continuing trustees, except a continuing trustee who has been appointed as a temporary trustee under section 8(2)(a) [Uniform Act section 5(2)(b)];[65]
- The person appointed in writing by the last remaining trustee to be a replacement trustee after the last remaining trustee's death [Uniform Act section 7];
- The personal representative of the last remaining trustee [Uniform Act section 5(2)(c)];
- The appropriate government office [Uniform Act section 5(1)(b)].

2. DECISION-MAKING PROCESS

[160] The Uniform Act groups designated persons into classes. For the class of persons named in the trust instrument, Uniform Act section 5(3) specifies that decision-making is by majority. If there is no majority decision, the class is considered to be unable to act. In this event, decision-making power would pass to the next class of designated persons.

[161] The Uniform Act is not completely clear as to how appointment decisions are made in the other classes. Uniform Act section 5(2) refers to "the first of the following persons, proceeding in descending order, who is able and willing to act as a designated person." Does this mean that the authority to appoint goes to the first class member who indicates ability and willingness to act? Or does the authority stay with the first class that is able and willing to act? In which case, what is the decision-making process if there is more than one member in the class?

[162] Lack of clarity as to who may appoint if a class has multiple members will likely result in litigation. As the intent of the Uniform Act is to allow for the appointment of a replacement trustee without the need for a court application, litigation over the decision–making process would be unfortunate.

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[64] In light of Recommendation 13, reference to the beneficiary of a trust arising by enactment is omitted.

[65] As noted, Uniform Act section 8 prevents a continuing trustee who is a temporary trustee from appointing a permanent substitute.

[163] How should the decision-making process be clarified? One option is to clarify that the authority to appoint goes to the first class member able and willing to appoint. However, this approach is akin to calling "shot gun." It may also create disputes as to which class member acted first and lead to the appointment of different replacement trustees by different members. Fewer problems are likely to result if the majority rule that applies to persons nominated by a trust instrument is extended to the other classes of designated persons. Adopting a majority rule is also consistent with the general approach to decision-making adopted in Uniform Act section 53 and the process for trustees removing other trustees in Uniform Act section 15.

RECOMMENDATION 14

The new Act should provide that if there is more than one member in a class of designated persons, the designated persons in that class must act by majority.

3. WHO MAY BE APPOINTED

[164] The Uniform Act clarifies who may be appointed as a replacement trustee, in addition to the qualifications for trustees stated elsewhere in the Act and under common law. Uniform Act section 5 provides that a designated person may be appointed as a replacement trustee – either by self-appointment or appointment by another designated person. Section 5 also prevents a continuing trustee who is a temporary trustee from appointing a permanent replacement. This prevents a temporary trustee from appointing himself or herself as a permanent trustee and avoids policy concerns about the inappropriate use of delegated trustee powers and authority.

4. WHEN A REPLACEMENT TRUSTEE MAY BE APPOINTED

[165] Uniform Act section 6 sets out the following circumstances for appointing a replacement trustee:

- A person who was trustee is deceased;
- A person appointed as trustee dies before taking office;
- The trustee is a corporation that is dissolved;
- A person disclaims the office of trustee; or
- A person ceases to hold the office of trustee under section 12.

Uniform Act section 12 deals with trustee resignation, disqualification and removal.

B. Temporary Absence or Incapacity of Trustee

[166] The Uniform Act provisions regarding the temporary absence or incapacity of a trustee are described in detail in Chapter 2. In brief, Uniform Act sections 8 and 50 should be combined to create a single scheme to address a trustee's need to delegate some or all powers and duties for a specified period of time.

[167] The power and authority that may be transferred to another on a temporary basis is broader than what may be delegated to an agent. In particular, allowing another person to act when a trustee is temporarily unable to do so may require the exercise of distributive powers or adjusting investment objectives. Accordingly, the sample draft provision combining sections 8 and 50 is included in this Part, as it is akin to appointing a replacement trustee for a defined period of time.

C. Court Appointment of Replacement or Additional Trustee

1. WHEN COURT MAY APPOINT

[168] Uniform Act section 9 gives the court authority to appoint replacement or additional trustees. This section prevails over contrary provisions in a trust instrument.

[169] Uniform Act section 9(1)(a) allows a court appointment where a trustee is removed by the court because the trustee is incompetent, nonresponsive or uncooperative and his or her conduct is detrimental to the trust. Uniform Act section 9(1)(b) allows for appointment when it is expedient and in the best interests of the trust.

[170] Uniform Act section 9 is largely similar to *Trustee Act* section 16 which allows a court to appoint a new trustee if there is no existing trustee. Section 16

also allows a court to appoint a new trustee as a replacement for, or in addition to, any existing trustee.[66]

[171] The issue is whether trustee legislation should include the more general provision for court authority to appoint new trustees included in the Uniform Act.

[172] The Uniform Act section 9(1), although worded differently than *Trustee Act* section 16(1), conveys the same authority and appropriately uses the term "may" to acknowledge that the court exercises discretion. The Uniform Act section 9(1) is clear when considered in the context of the scheme of the Uniform Act.

[173] An application under section 9(1) may be brought by a trustee, beneficiary or secured party.

2. APPOINTMENT OF JUDICIAL TRUSTEES

[174] The Uniform Act incorporates the concepts associated with court appointment and supervision of judicial trustees in various sections. In particular, Uniform Act sections 9(2)-(5) provide that the court, in appointing a substitute or additional trustee, can appoint any person as a judicial trustee and appoint that person as a sole trustee, co-trustee or in place of all existing trustees. Section 9(3) provides that judicial trustees are officers of the court. Section 9(4) allows the court to give directions to a judicial trustee about the trust or its administration with or without application. Under section 9(5) a court may determine or provide for the amount and source of compensation for a judicial trustee.

[175] Uniform Act section 69 also provides for the compensation of judicial trustees. Further, Uniform Act section 85 authorizes a beneficiary, trustee or secured party with a security interest in trust property to apply to the court for

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[66] *Trustee Act* states:

> **Order appointing new trustee**
>
> **16(1)** When it is expedient to appoint a new trustee and it is found inexpedient, difficult or impractical to do so without the assistance of the court, the Court of Queen's Bench may make an order appointing a new trustee
>
> (a) if there is no existing trustee, or
>
> (b) in substitution for or in addition to any existing trustee.
>
> ...
>
> **(3)** An order under this section, and any consequential vesting order or conveyance, operates no further as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.
>
> **(4)** Nothing in this section gives power to appoint an executor or administrator.

an order in respect of a trust, which would include an order to appoint a judicial trustee.

[176] *Trustee Act* section 46 also provides for the appointment of judicial trustees.[67] Pursuant to section 46 a settlor, trustee, beneficiary or any other person interested in a trust or trust property can apply to the court to have a judicial trustee appointed. A judicial trustee is subject to the control and supervision of the court.

[177] Although the Uniform Act provisions are similar to the *Trustee Act*, the Uniform Act does not cover all the points of Alberta law. The issue is whether trustee legislation should be updated to reflect modern trust practice and the role of judicial trustees and others who may be appointed to report to the court on trust matters.

[178] *Trustee Act* section 46 is substantially the same as when it was first enacted in the *Trustee Ordinance*. The main difference is that the current *Trustee Act* allows other persons interested in trust property to apply to the court for appointment of a judicial trustee.

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[67] *Trustee Act* states:

> **Judicial trust**
>
> **46(1)** Application may be made to the Court of Queen's Bench
>
> (a) by or on behalf of the person creating or intending to create a trust,
>
> (b) by or on behalf of a trustee or beneficiary, or
>
> (c) by any person interested in the trust or the trust property or in the administration or realization of the trust property either as a creditor or otherwise,
>
> and on the application the court may in its discretion appoint a person, in this Act called a judicial trustee, to be a trustee of the trust either jointly with any other person or as sole trustee, and if sufficient cause is shown in place of all or any existing trustees.
>
> **(2)** The administration of the property of a deceased person whether a testator or intestate is a trust and the executor or administrator a trustee within the meaning of this section.
>
> **(3)** Any fit and proper person nominated for the purpose in the application may be appointed a judicial trustee or
>
> (a) in the absence of a nomination, or
>
> (b) if the court is not satisfied of the fitness of a person so nominated,
>
> an official of the court or other competent person may be appointed.
>
> **(4)** A judicial trustee is subject to the control and supervision of the court as an officer of it.
>
> **(5)** The court may either on request or without request give to a judicial trustee any general or special directions in regard to the trust or the administration of it.
>
> **(6)** There may be paid to a judicial trustee out of the trust property remuneration not exceeding the prescribed limits that the court may assign in each case, and the remuneration so assigned to a judicial trustee shall, except as the court for special reasons otherwise orders, cover all the judicial trustee's work and personal outlay.
>
> **(7)** Once in every year the accounts of every trust of which a judicial trustee has been appointed shall be audited and a report on those accounts made to the court by the prescribed persons, and in any case where the court so directs an inquiry into the administration by a judicial trustee of any trust, or into any dealing or transaction of a judicial trustee, shall be made in the prescribed manner.

[179] There seem to be three concepts related to judicial trustees currently incorporated in *Trustee Act* section 46 that are not reflected in the Uniform Act. First, it is possible under the *Trustee Act* for a settlor to apply to the court for the appointment of a judicial trustee under either section 46(1)(a) as the creator of a trust or section 46(1)(c) as a person "interested" in the trust. In contrast, the ULCC commentary concerning Uniform Act section 85 expressly states that neither a settlor nor the settlor's estate can make an application to the court concerning trust matters.

[180] Second, estate administration is expressly defined as a trust for purposes of the appointment of a judicial trustee in *Trustee Act* section 46(2). Although stating that estate administration is a trust for the purposes of *Trustee Act* section 46 seems redundant given that estate representatives are generally defined as trustees in section 1 of the *Trustee Act*, the overall effect of section 46(2) may be to allow the court to appoint a judicial trustee in addition to or as a replacement for a personal representative.

[181] Third, pursuant to *Trustee Act* section 46(7) the accounts of a judicial trust must be audited and a report given to the court every year with additional actions taken as may be directed by the court. Under Uniform Act sections 28-29, judicial trustees are required to report only to qualified beneficiaries. However, the court order appointing the judicial trustee could stipulate different requirements.

[182] In general, the Uniform Act provisions concerning judicial trustees are preferred when compared to those in the *Trustee Act*. However, at a fundamental level, the description and implications of a judicial trustee appointed by, and as an officer of, the court raises some concern in the modern trust context.

[183] In particular, the meaning of "officer of the court" in Uniform Act section 9(3) is unclear. On a plain language reading, the phrase indicates that a judicial trustee reports to and is only accountable to the court. Lawyers are "officers of the court" and the role comes with clearly understood rights and responsibilities that are appropriate in the context of litigation and court practice. The officer of the court role is not equally evident when attached to a judicial trustee.

[184] In addition, it seems unusual to bundle a special type of trustee, that is the judicial trustee, into Uniform Act section 9, which generally describes the court's power to appoint a substitute or additional trustee to perform ordinary trustee duties in accordance with the trust instrument and legislation. Beneficiaries should be able to rely on the full power of the legislation to ensure that a trustee

performs his or her duties. This would not seem to be the case with a judicial trustee who is a "special" trustee governed by, and accountable to, the court.

[185] A judicial trustee is a special entity and the legislation describes a rarely used mechanism for bringing a trust under the direct jurisdiction of the court, should that be in the best interests of the trust. Very special circumstances could arise that require the intervention of the court such that a judge would become seized of a trust and appoint a judicial trustee to take charge and report back to the court. In these circumstances, the judicial trustee as an officer of the court would be somewhat analogous to a trustee in bankruptcy.

[186] There have been court appointees charged with reviewing material related to a trust matter and reporting directly to the court; however, these appointees did not perform any trustee duties or exercise any trustee powers. On other occasions, lawyers have served in an *amicus curae* capacity and trustees have been ordered to pass accounts by specific chartered accountants who reported to the court.

[187] Although the concept of a court appointed judicial trustee has been entrenched in Alberta's trustee legislation for a long time as a separate section and special type of trustee, a modern court would likely be very hesitant to take direct control of a trust, although very special situations could, in theory, still occur.

[188] This said, the court should not have the option of putting a judicial trustee in place when applications are made to remove an existing trustee or the regular mechanisms for appointing trustees are not suitable.

[189] The judicial trustee provisions in the Uniform Act do not fit well within the section for court appointment of an ordinary substitute or replacement trustee. Further, given the modern roles and responsibilities of persons appointed by the court to advise the court on trust matters, it is unlikely that the historic rationale for a court appointed judicial trustee who is an officer of the court remains relevant to modern trust practice. Trustee legislation should be updated to reflect modern trust practice by eliminating provisions that authorize the court to appoint a judicial trustee.

RECOMMENDATION 15

The new Act should not provide for the appointment of judicial trustees.

D. Person Not Qualified to be Appointed Trustee

[190] The Uniform Act section 10 provides that a person is not qualified to be appointed as a trustee if any of the following apply:

- The person is an incapacitated person [As noted in Chapter 3, the correct term for Alberta trustee legislation is "represented person"];
- The person has been convicted of an offence involving dishonest conduct under an enactment or a law of Canada or another province of Canada;
- The person is an undischarged bankrupt; or
- The person is a corporation that is in liquidation [As noted in Chapter 5, Alberta trustee legislation should provide that persons who are a corporation in liquidation "or otherwise disqualified" are not qualified to hold office as a trustee].

[191] As discussed in detail in Chapter 5, the above characteristics are enumerated in Uniform Act section 14 as characteristics that make a person not qualified to hold the office of trustee. It is appropriate that persons who are not qualified to hold the office of trustee are similarly unable to be appointed as trustee.

E. Powers and Duties of New Trustee

[192] The Uniform Act section 11 provides that a replacement or additional trustee appointed under the Act has the same powers and duties and may, in all respects, act as if originally appointed as a trustee under the trust instrument.

[193] The ULCC commentary notes this is a clarifying provision to ensure replacement or additional trustees are treated in the same way as original trustees and "ensures the efficient management of trust property when there is a change of trustees." This provision is appropriate and should be included in Alberta legislation.

CHAPTER 5

Trustee Ceases to Hold Office

A. Person Ceasing to Hold Office of Trustee

[194] Uniform Act section 12 provides that a trustee ceases to be a trustee if they resign, are no longer qualified to be a trustee or are removed in accordance with the trust instrument or the Act. These are appropriate circumstances and reflect what is currently provided in the *Trustee Act.* Death of the trustee would also be an appropriate addition to the list. However, there are other issues with respect to when a person ceases to be a trustee. These issues are discussed in the sections below.

B. Resignation by Trustee

[195] Uniform Act section 13 allows a trustee to resign by providing written notice to the appropriate persons. Pursuant to Uniform Act section 2(5), section 13 prevails over contrary provisions in the trust instrument.

[196] In contrast, *Trustee Act* sections 14 and 15 permit a sole trustee or co-trustee, with consent of the others, who no longer wishes to perform the functions of trustee to apply to the court for a discharge. In each case, the ability to apply to the court for discharge is subject to a contrary intention expressed in the trust instrument.

[197] Under *Trustee Act* section 14(2), a trustee may apply to the court for an order discharging the trustee and passing the accounts of the trust. The court may grant the order and appoint another person as trustee.[68]

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[68] *Trustee Act* states:

> **Substitute trustee**
>
> **14(2)** When a trustee after having commenced to act and before having fully discharged and performed the trusts and powers reposed in the trustee desires to be discharged from the trusts and powers reposed in the trustee,
>
> (a) the trustee may make application to the Court of Queen's Bench for an order passing the accounts of the trust to the date of the application and discharging the trustee from the trust and appointing a new trustee in the trustee's place, and
>
> (b) the court, on the hearing of the application and after the passing of the accounts, may make an order discharging the applicant and
>
> (i) appointing as trustee any fit and proper person nominated for the purpose in the application, or
>
> *Continued*

[198] The main issue is whether trustee legislation should be changed to authorize a trustee to resign without court involvement as proposed in Uniform Act section 13. A secondary consideration is whether it is advantageous to retain the provision that a trustee may apply to be formally discharged by the court.

[199] The court supervised trustee discharge process under the *Trustee Act* is clear, final and, in the case of a sole trustee applying under *Trustee Act* section 14, establishes the state of the trust by way of a formal passing of accounts.

[200] Under the *Trustee Act* the only way for a trustee to officially resign is to apply to the court for a discharge. However, what is meant by the term "discharge" is not well understood, particularly as it relates to trustee liability. Ross J. clarified the issue in *Svoboda v Kuzel*. In that case, Kuzel applied to the court for a full discharge, seeking to be relieved of further claims relating to his administration of an estate. Ross J. stated that although "discharge" is not defined in the statute, "the effect of a discharge is to absolve the trustee from any remaining fiduciary duties owed to the estate and its beneficiaries."[69]

[201] Speaking to the misconception that a court discharge gives a trustee immunity from future litigation and liability, Ross J. noted that immunity is not necessary as there are a number of defences available to a trustee in the event a breach of trust claim is made.[70] In addition, she stated: [71]

> The law seeks to protect beneficiaries and the incapacitated by providing remedies against trustees who abuse their position. By

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(ii) if not satisfied of the fitness of the person so nominated, appointing an official of the court or other competent person as trustee,

and on that appointment, the trustee desiring to be discharged is discharged from the trust.

…

Application for discharge

15(1) When there are more than 2 trustees

(a) if one of them declares that the trustee is desirous of being discharged from the trust, and

(b) if the trustee's co-trustees and any other person who is empowered to appoint trustees consent to the discharge of the trustee and to the vesting in the co-trustees of the trust property,

then the trustee desirous of being discharged may make an application to the Court of Queen's Bench.

(2) When on the application it appears to the satisfaction of the court that it is fit and proper to do so, the court may order that the trustee be discharged from the trust without any new trustee being appointed in the trustee's place, but the court may in that case require the passing of accounts.

(3) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(4) This section applies only if and so far as a contrary intention is not expressed in the instrument, if any, creating the trust, and has effect subject to the terms of that instrument and to the provisions contained in it.

[69] *Svoboda*, note 58 at para 18.

[70] *Svoboda*, note 58 at para 24.

[71] *Svoboda*, note 58 at para 26.

> providing a discharged trustee with immunity against future claims for breach of trust, the Court would in effect be rewarding a successfully dishonest trustee.

Ross J. further noted that shielding a trustee from future liability at the time of discharge could interfere with a beneficiary's right to assert his or her interest in trust property.[72] Finally, she reviewed the inherent jurisdiction of the court in trust matters and concluded that it likely does not extend to issuing an order that would absolve a trustee from all future liability.[73]

[202] In comparison, the Uniform Act resignation process appears simple and cost effective. The Uniform Act resignation provisions do not use the term "discharge" or give the impression that a trustee goes to court and is given an order that fully relieves them of liability. In general, Uniform Act section 13 provides a better approach for a trustee who wishes to voluntarily resign.

[203] That said, the current practice under *Trustee Act* sections 14 and 15 is that a trustee seeking to resign will pass accounts by the beneficiaries and ask each for a release. If the beneficiaries sign off, that is often the end of it. In some cases the trustee will also file the releases as part of an application for formal discharge. In the event beneficiaries do not release the trustee, the trustee will often apply to the court for release and discharge.

[204] The resignation process described in Uniform Act section 13 could be enhanced by adding a measure of trustee accountability, including some aspects of the current practice under *Trustee Act* sections 14 and 15.

[205] In particular, Uniform Act section 13 should also specify that a trustee may resign if the following conditions are met:

- There is more than one trustee or, in the case of a sole trustee, a suitable replacement trustee is able and willing to take on the role; and
- The resigning trustee informally passes accounts by the beneficiaries.

With respect to the informal passing of accounts, this process would require the trustee to provide an accounting to beneficiaries. The trustee must be able to show proof that he or she provided notice of the resignation and the accounting to the beneficiaries.

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[72] *Svoboda*, note 58 at para 28.

[73] *Svoboda*, note 58 at paras 30-31.

[206] With respect to finding a replacement trustee, Uniform Act section 13 requires the resigning trustee to notify someone with the authority to appoint a replacement trustee. While Uniform Act section 13 does not expressly use the concept designated person set out in section 5, the effect is the same. Uniform Act section 13 should be modified to better reflect the list and priority of designated persons set out in section 5. The resigning trustee should be required to notify the first of the following designated persons, or class of designated persons, to alert them to the need to appoint a replacement trustee:[74]

- The person nominated by the trust instrument for the purpose of appointing a replacement trustee;
- The continuing trustees, if any;
- The appropriate government office.

[207] Further, a trustee should continue to have the option of making an application to be discharged by the court.

[208] Finally, a trustee's resignation should be effective either upon the appointment of a replacement trustee or upon the making of a court order discharging the trustee, whichever occurs first.

RECOMMENDATION 16

The new Act should authorize a trustee to resign without court involvement where:

- The resigning trustee gives written notice of resignation to the designated persons or class of designated persons with authority to appoint a replacement trustee;
- A suitable replacement trustee is able and willing to act; and
- The resigning trustee provides an accounting to beneficiaries.

RECOMMENDATION 17

The new Act should provide for a trustee to provide proof that written notice was given to the designated persons and an accounting was provided to the beneficiaries.

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[74] While the list of designated persons is longer in Uniform Act section 5, as the trustee is resigning there is no need to notify the designated person who might take authority on the trustee's death.

RECOMMENDATION 18

The new Act should retain the option for a trustee to apply to the court to be discharged.

RECOMMENDATION 19

The new Act should specify that a trustee's resignation is effective upon the earliest of:

- The appointment of a replacement trustee; or
- A court order discharging the trustee.

C. Person Not Qualified to Hold Office of Trustee

1. CIRCUMSTANCES OF DISQUALIFICATION

[209] Uniform Act section 14 lists the circumstances in which persons or corporations may be disqualified as a trustee. The circumstances are similar to those listed in the *Trustee Act* section 16(2).[75]

[210] In general, the list of factors in Uniform Act section 14 provides practical guidance as to who may not be appointed as a trustee, when a trustee may be asked to resign or when an application can be made to remove the trustee. In particular, using the term "dishonest conduct" to describe an offence of a disqualified trustee rather than an "indictable offence" increases the opportunities to resolve issues with a problematic trustee and expands the court's discretion.

[211] However, two modifications are required to take account of Alberta law:

- The reference to "incapacitated person" should be changed to "represented adult," as discussed in Chapter 3.

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[75] *Trustee Act* states:

> **Order appointing new trustee**
>
> **16(2)** The court, in particular and without prejudice to the generality of subsection (1), may make an order appointing a new trustee in substitution for a trustee
>
> (a) who has been convicted of an indictable offence,
>
> (b) who is a formal patient under the *Mental Health Act* or in respect of whom a guardian or trustee is appointed under the *Adult Guardianship and Trusteeship Act* or a certificate of incapacity is in effect under the *Public Trustee Act*,
>
> (c) who is a bankrupt, or
>
> (d) that is a corporation in liquidation or that has been dissolved.

- With respect to a corporate trustee, the word "liquidation" should be followed by the words "or otherwise disqualified" to reflect the idea that other circumstances may preclude a corporation from serving as a trustee.[76]

2. PROCEDURE

[212] Under the Uniform Act a trustee will automatically cease to hold office if he or she is no longer qualified. In contrast, the *Trustee Act* section 16(2) provides that a court may appoint a new trustee to replace one who is unqualified.[77]

[213] The issue is whether trustee legislation should provide for the automatic disqualification of trustees where the trustee is no longer qualified.

[214] The *Trustee Act's* express replacement of a disqualified trustee by the court provides more certainty than the automatic approach outlined in the Uniform Act. It may be difficult to tell when a trustee is disqualified under Uniform Act as the court is not expressly involved in the disqualification process. Trustee legislation should continue to provide, consistent with the *Trustee Act,* that the court may be asked to determine that a trustee is disqualified and make an order concerning when the disqualification takes effect.

RECOMMENDATION 20

The new Act should retain the provision that the court may, on application, determine that a trustee is disqualified and establish the date on which such disqualification takes effect.

D. Removal by Other Trustees

[215] The Uniform Act includes factors which make a trustee unfit and describes a process for removing an unfit trustee from office.

[216] The *Trustee Act* does not expressly address situations where a trustee, although technically qualified to function in the role, may be unsuitable and should not continue as trustee.

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[76] For example, a corporation might be disqualified if it fails to satisfy requirements. Further, Alberta only allows trust companies to serve as trustee and not other corporations as in some other jurisdictions.

[77] *Trustee Act*, s 16(2).

[217] The issue is whether trustee legislation should be updated to allow a trustee to be removed from the office for being unfit through a non-judicial process.

[218] Uniform Act section 15(1) defines what it means to be unfit to fulfill the role of trustee. According to the ULCC comments, a trustee who is "incompetent, nonresponsive or uncooperative and whose conduct is detrimental" to the trust is not fit to be a trustee.

[219] The factors in Uniform Act section 15(1) are not controversial. It is consistent with good trust practice that a person exhibiting these characteristics should not be a trustee. However, ALRI has concerns about the use of the term "unfit" and proposes the use of more neutral language that is not associated with mental capacity or moral culpability.

[220] Uniform Act sections 15(2)–(7) describe the process whereby trustees can remove another trustee if there are three or more trustees. The ULCC comments on the trustee-initiated majority rule process for removing a co-trustee indicate that sections 15(5)-(7) give a removed trustee "due process" in terms of responding.

[221] The majority rule removal process poses some potential for misuse given the vague, fitness-based test of Uniform Act section 15(3), the short time line, and the serious outcome for a removed trustee. The risk of misuse is mitigated by the requirement that Uniform Act section 15 be applied in a manner that is consistent with the overall purpose of the legislation, which is to facilitate proper and fair trust administration.

[222] Uniform Act section 15 establishes a reasonable process in that it requires there be at least three trustees and a majority of the trustees must agree to remove another co-trustee. The two-trustee and sole trustee situations are appropriately covered in other provisions whereby a beneficiary or co-trustee seeking to remove another trustee would apply to the court.

[223] Implementing Uniform Act section 15 will help resolve trust management problems that arise when a trustee is not performing his or her duties. Section 15 provides an effective way to remove such a trustee without the difficulty and expense of going to court. It is unlikely that the section will be used very often, but it is an important tool to help ensure that trusts are properly and fairly administered.

[224] The clear description of factors that allow trustees to remove another trustee in Uniform Act section 15 may also be helpful to the court when deciding removal applications.

RECOMMENDATION 21

The new Act should provide for the removal of a trustee by other trustees as proposed in Uniform Act section 15.

RECOMMENDATION 22

The new Act should specify the circumstances which warrant removing a trustee without reference to a vague standard of fitness.

E. Power of Court to Remove Trustee

[225] Uniform Act section 16 describes the court's power to remove a trustee who is imprudent, nonresponsive or uncooperative and whose conduct is detrimental to the trust; in other words, a trustee who can be removed by other trustees pursuant to section 15. Section 16 prevails over any contrary provisions in the trust instrument. An application for an order under this section may be brought by a trustee, beneficiary or secured party.

[226] The *Trustee Act* does not include provisions specifically allowing a court to remove a trustee who is imprudent, nonresponsive or uncooperative and whose conduct is detrimental to the trust. The issue is whether trustee legislation should expressly provide that the court may remove such a trustee.

[227] The Uniform Act clarifies the role of the court by expressly authorizing the court to remove a trustee if another removal process is not available or practical and the court considers that it is in the best interests of the objects of the trust that a trustee be removed.

[228] The ULCC comments indicate that the court can exercise discretion to remove a trustee even if another process is available and even if removing the trustee would reduce the number of trustees.

[229] Explicitly stating that the court can remove a trustee who is imprudent, nonresponsive or uncooperative and whose conduct is detrimental to the trust provides clear notice to trustees that they can be removed if they fail to carry out trustee duties in a responsible fashion.

RECOMMENDATION 23

The new Act should describe the court's authority to remove a trustee as proposed in Uniform Act section 16.

F. Power of Court to Reinstate Trustee

[230] Under Uniform Act section 17 a court may reinstate a person who has been removed as a trustee, as long as that person was not removed by the court under sections 16 or 78. This section prevails over any contrary provisions in the trust instrument.

[231] The issue is whether it is necessary to expressly provide that the court has authority to reinstate a trustee.

[232] According to the ULCC, Uniform Act section 17 allows the court to grant relief in the event a trustee is wrongly removed or improperly discharged.

[233] The section is a necessary corollary to the non-judicial mechanisms for removing and replacing trustees found elsewhere in the Uniform Act. The basis for the court application (mistake of fact or law), grounds for relief (court discretion as to best interest of the trust) and description of terms of the resulting court order are appropriate.

[234] In terms of determining the date on which a trustee may be reinstated, Uniform Act section 17(3)(a) permits the court to reinstate the trustee on a specified date and section 17(3)(b) provides that the court may declare that the trustee did not cease to hold office during the period of removal. Section 17(3)(b) has the effect of reinstating the trustee on the date he or she was removed, which may be necessary or preferred, depending on the circumstances.

RECOMMENDATION 24

The new Act should expressly state that the court may reinstate a trustee on application as proposed in Uniform Act section 17.

G. Mistaken Belief Does Not Invalidate Actions of Trustee

[235] Uniform Act section 18 validates the actions of trustees who are acting as trustees by mistake.

[236] The *Trustee Act* has nothing similar to Uniform Act section 18. The issue is whether it is necessary or desirable for trustee legislation to include provisions that validate the actions of a trustee who functions as such by mistake.

[237] The ULCC comments on section 18 indicate that actions taken by a substitute, remaining or original trustee who acted as such on the basis of a mistake in fact or law are not invalid. Further, according to the ULCC, the intent of the section is to protect innocent *bona fide* third parties who deal with trustees.

[238] It is not necessary or advantageous to validate the actions of a trustee who is functioning as such by mistake. Uniform Act section 18 is not consistent with Alberta policy and law and should not be included.

RECOMMENDATION 25

The new Act should not validate the acts of a trustee who is acting as trustee by mistake.

H. Liability of Former Trustee

[239] The Uniform Act section 19 provides that unless the court orders otherwise, if a person ceases to be a trustee, any consequential vesting of trust property in or transfer of trust property to a substitute trustee does not relieve the former trustee of liability for a breach of trust occurring while that person was a trustee.

[240] This is an appropriate provision to include in trustee legislation. The ULCC commentary notes that the section "ensures that changes to the title of the trust property after a trustee leaves office will not affect the trustee's liability."

CHAPTER 6
Vesting

A. Joint Tenants

[241] The Uniform Act section 20 provides that if trust property vests in more than one trustee, the trust property vests in the trustees as joint tenants.

[242] This is an appropriate provision and should be included in trustee legislation.

B. Vesting

[243] Uniform Act section 21 provides that vesting and divesting of trust property occurs automatically and without the need for court intervention. Section 21 prevails over contrary provisions in a trust instrument.

[244] *Trustee Act* section 17 deals with vesting of trust property. Pursuant to section 17 trust property vests in a trustee immediately upon appointment and without any conveyance or assignment necessary. However, section 17 makes it very clear that a trustee's authority concerning real property is subject to any requirements of registration in the *Land Titles Act*.

[245] Under the *Land Titles Act*, the trustee named in a trust instrument is deemed to be the absolute and beneficial owner of the land subject to the trust for the purposes of the *Land Titles Act*. The certificate of title makes no mention of a trust or the fact that the owner is a trustee.[78]

[246] Uniform Act section 21(6) generally contemplates that a transfer of trust property may need to be registered to be perfected but it does not make specific reference to any particular statute or type of statute. The issue is whether trustee legislation should incorporate the other statutory requirements for vesting of real property by general or specific reference.

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[78] *Land Titles Act*, RSA 2000, c L-4 [*Land Titles Act*] states:

> **Registration of trusts**
>
> **47** No memorandum or entry shall be made, on a certificate of title, of any notice of trusts, whether expressed, implied or constructive, but the Registrar shall treat any instrument containing any such notice as if there were no trust, and the trustee or trustees named in the instrument are deemed to be the absolute and beneficial owners of the land for the purposes of this Act.

[247] As noted, Alberta trustee legislation makes the vesting of land in a trustee subject to provisions of the *Land Titles Act*. Alberta's title registry system requires trustees to show the instrument by which they acquire legal ownership of real property. A trustee is then registered as the owner of the property on the certificate of title. Ownership, authority and power transfers on registration, and not before. Proof of authority or ownership of land is critical to a trustee's ability to administer, manage, and distribute trust property.

[248] In practice, it may make no difference whether the trustee legislation makes general reference to other enactments or specifically names the *Land Titles Act*, as long as the transmission of title to a trustee is accomplished as efficiently as possible. For example, the trustee legislation could be revised to make it easier for title to pass from one trustee to another in the event the first trustee dies. However, reforms of this nature are not contemplated under the Uniform Act. Further, they raise additional issues and would require changes to other Alberta statutes and extensive consultation with the Land Titles Office.

[249] On the issue of general as compared to specific reference, it is sensible to provide clear and specific notice in trustee legislation that the vesting of title to real property is subject to other legislation, specifically the *Land Titles Act*.

C. Vesting of Leasehold Property

[250] Uniform Act section 22 provides that the vesting of leasehold property in a trustee as lessee does not require the consent of the lessor, is not a breach of a lease in relation to the lessee's disposition of interest in the property, and does not give rise to forfeiture, right of re-entry or other remedies under the lease.

[251] According to the ULCC, Uniform Act section 22 introduces the concept that vesting leasehold property in a trustee is to be treated as a neutral event that does not affect specified rights, obligations or remedies of the parties to a lease agreement.

[252] The *Trustee Act* does not address the vesting of leasehold property in a trustee. The issue is whether trustee legislation should include provisions respecting the law as it relates to the vesting of leasehold property in a trustee and, if so, whether Uniform Act section 22 includes the appropriate provisions.

[253] Although there may be some administrative advantages to including Uniform Act section 22 in trustee legislation, it does not reflect current leasehold

practice. It may also be contentious, primarily for reasons related to a property owner's ongoing interests and rights to control sites and properties.

[254] In particular, the provisions in Uniform Act section 22 are often addressed as terms in lease agreements. Even if section 22 were included in trustee legislation, it is unlikely that lease agreements would afford special status to trustees. It is more likely that terms would be added to lease agreements to expressly contract out of section 22.

[255] The provisions of Uniform Act section 22 would also be contentious in the context of an assignment of a franchise property to a trustee, given that a franchisor typically exerts considerable ongoing control over many aspects of a franchise, including who operates it. There are several other examples, including commercial leases, residential properties and situations where business assets are put into trust on the death of an owner, where the rights and interests of a property owner or lessor could be infringed if Uniform Act section 22 were included in trustee legislation.

RECOMMENDATION 26

The new Act should not include provisions concerning leasehold property that purport to dispense with the lessor's consent or that may be contrary to the terms of a lease.

D. Vesting Orders

[256] Uniform Act section 23 describes the court's authority to issue vesting orders. This section prevails over contrary provisions in a trust instrument.

[257] In particular a court may make an order vesting all or part of the trust property, or appointing a person to make or join in making a transfer of all or part of the trust property, in a person in a manner and on terms and conditions the court considers appropriate. Such an order can be made on application by the Attorney General or a beneficiary, trustee or secured party who has a security interest in the trust property.

[258] The issue is whether it is necessary or advantageous to include a general provision in trustee legislation that authorizes the court to issue an order vesting trust property.

[259] The ULCC comments indicate that this section is not likely to be used very often. Further, it is intended to provide an "ultimate" mechanism for vesting in

the event property is not able to vest under the Act or vesting would otherwise be very difficult to accomplish. According to the ULCC, an example of when this section could be useful would be when all the trustees are dead.

[260] Uniform Act section 21, discussed above, is the main section in the Act that addresses vesting of trust property in a trustee. Uniform Act section 23 may be proposed out of an abundance of caution to facilitate the ongoing administration and management of trusts. Consistent with this interpretation section 23 could be used, for example, to get a court order to resolve a situation where, despite the fact that all the requirements for vesting have been fulfilled, someone refuses to deal with a trustee or complete a transaction involving trust property.

[261] Based on the placement of Uniform Act section 23 in proximity to other sections concerning vesting of property in the name of trustees, it could be assumed that the intent is that the court would issue the order to vest property in a trustee. However, section 23 does not say this. Section 23, as written, could be used to vest unvested property in any person. For example, what would prevent beneficiaries entitled to receive property some years down the road from using this section to ask the court to vest the property immediately?

[262] Of further concern is the fact that Uniform Act section 23 prevails over contrary terms in a trust instrument. Section 23 could give the court power to authorize early vesting of property in a beneficiary, shorten the duration of a trust, or otherwise vary trust terms by vesting property in various persons. Given all the other Uniform Act sections that deal with variation of trusts, it is not necessary or desirable that the court have this power. Uniform Act section 23 should not be included in trustee legislation.

RECOMMENDATION 27

The new Act should not provide for a separate, discretionary court power to vest trust property in a person.

CHAPTER 7

General Administrative Powers

A. Powers of Trustee

[263] Uniform Act section 24 clarifies and broadens a trustee's general administrative powers.

[264] Specifically, Uniform Act section 24(1) provides that a trustee has powers in relation to trust property equal to those of a capable, vested, legal owner, Furthermore, such powers are subject to the statute and to the trustee's responsibilities as a fiduciary.

[265] Uniform Act section 24(2)(a) authorizes a trustee to sell or lease property regardless of whether there is an express or implied power to do so under the trust instrument. Section 24(2)(b) gives the trustee general powers to borrow against trust property or create security interests in property without the trust instrument specifying that the trustee can encumber trust property.

[266] Uniform Act section 24(3) allows a trustee to rent, lease, purchase, build or otherwise acquire a house for use by a beneficiary.

[267] *Trustee Act* section 3(4) is less specific than Uniform Act section 24.[79] The main issue is whether trustee legislation should clarify and broaden the scope of a trustee's general administrative authority by specifically giving the trustee the powers contemplated under Uniform Act section 24.

1. SCOPE OF A TRUSTEE'S GENERAL ADMINISTRATIVE POWERS

[268] The ULCC comments concerning Uniform Act section 24(2) indicate generally that the purpose of the section is to reassure those who have commercial dealings with trustees. This reassurance is given by expressing and enhancing the trustee's power to sell and lease property, borrow money and create security interests.

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[79] *Trustee Act* states:

> **Powers and duties with respect to investment**
>
> **3(4)** A trustee who has invested trust funds in property may exercise for the benefit of the trust any right or power that a person who was both the legal and beneficial owner of the trust's interest in the property could exercise.

[269] The ULCC comments on section 24(2)(a) state that under existing law there are two situations when a trustee can sell property. The first is where the authority to do so is expressed in the trust instrument. The second situation arises where the trust instrument is silent on the matter. In this case, the authority to sell may be a result of the trustee's duty to maintain an even hand between income and capital beneficiaries. The "even hand" principle dictates that a trustee must sell wasting, hazardous or speculative assets which disproportionately benefit capital beneficiaries.

[270] According to the ULCC, section 24(2)(a) changes the law by authorizing the trustee to sell and lease property without the need for anything to be said or implied under the trust instrument. If a settlor is unhappy with the trustee's default statutory authority to sell and lease, the settlor can override these provisions in the trust instrument.

[271] Similarly, the ULCC comments on Uniform Act section 24(2)(b) indicate that the intent is to give trustees general borrowing powers and the associated authority to create security interests in trust property instead of specifying approved purposes for borrowing. According to the ULCC, the reason for this enhancement is to ensure that nothing is inadvertently missed.

[272] It is not clear from the ULCC commentary whether section 24(2)(b) changes the law. At a minimum, conferring a general statutory power to borrow money and encumber trust property to carry out the purpose of the trust changes the law in that, if a settlor does not agree that a trustee should have these powers, the settlor must override the legislation in the trust instrument.

[273] According to the ULCC, Uniform Act section 24(3)(a) removes the common law distinction between a trustee investing assets in land, which is permitted, and purchasing land or otherwise acquiring property for use as a beneficiary's home, which is not. The ULCC notes, "[t]his provision reverses the common law" while retaining the restriction that funds used to acquire the home must be those to which the beneficiary is entitled under terms of the trust.

[274] There are a number of reasons to adopt Uniform Act section 24. First, it is well drafted to match the practice of authorizing a trustee to do all that is necessary. Second, the approach is similar to that in Alberta's *Powers of Attorney Act*, using the statute to establish a broad framework for the attorney's administrative authority.[80] The benefit of the broad approach is that powers of

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[80] *Powers of Attorney Act*, note 39.

attorney documents can be fairly short. The same would likely be true of trust instruments if trustee legislation included the broad authority provisions set out in Uniform Act section 24. Third, authorizing the trustee to sell and lease real property in the statute would address the problem of a trustee having to get consent from the beneficiaries every time the trustee needs to deal with real property.

[275] Fourth, Uniform Act section 24(2)(b) may help reduce the incidence of practical problems associated with a trustee's power to borrow. Borrowing is currently considered to be an extraordinary power.[81] Historically, the power to borrow raises particularly difficult issues in the estate administration context.[82] That said, the borrowing provision may be comfortably included in trustee legislation provided that, as contemplated in the Uniform Act, it may be expressly excluded under the trust instrument. Including the statutory power to borrow would also help target a problem that trustees have with lenders. Lenders are often reluctant to lend unless they see a detailed authority to borrow in the trust instrument. If the authority to borrow were included in legislation, a trustee need only show the trust instrument as proof that there is nothing prohibiting borrowing. This may reduce the amount of time trustees spend convincing lenders that they can borrow and that the use of the borrowed funds is permitted.

[276] The Uniform Act clarifies that a trustee's powers concerning trust property are subject to the full spectrum of a trustee's fiduciary obligations to improve the existing property. Including the expanded power provisions of Uniform Act section 24(2) may make trust administration more efficient. However, a settlor who does not want the trustee to have the expanded powers would need to override the legislative authority of these provisions in the trust instrument.

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[81] See Waters at 1141, note 19:

> Except in the new Saskatchewan statute..., there is no general borrowing power conferred [on trustees] by statute. Such a power has therefore to be express: in the modern context this is a surprising omission from the statutes that list trustee administrative powers.

[82] See *Re Breckinridge Estate*, [1918] 3 WWR 803 (SC) where the Alberta Supreme Court determined that if a will does not give the personal representative the power to borrow, expressly or impliedly, the estate is not legally obligated to repay a person who loans money to the personal representative to allow him or her to pay the estate's debts.

However, see the *Estate Administration Act*, s 20, which provides that a personal representative stands in the shoes of the deceased person and has the same powers over property to administer the estate.

RECOMMENDATION 28

The new Act should specify and broaden a trustee's general administrative powers as proposed in Uniform Act section 24.

2. MEANING OF "APPROPRIATE"

[277] A minor issue concerning Uniform Act section 24(3)(b) is that the ULCC comments do not explain what is meant by the verb "appropriate." The context and a plain language interpretation of the section seem to indicate that "appropriation" describes a situation where a trustee uses or transfers assets entrusted for specific uses or beneficiaries to satisfy the entitlements of another beneficiary. In the trust context, a distribution in kind more accurately reflects the concept of what a trustee may do.

B. Power of Court to Confer Further Powers on Trustees

[278] As provided in section 2 of the Uniform Act, section 25 prevails over any contrary provisions of a trust instrument. Section 25 is substantively similar to the existing *Trustee Act* provisions. [83] An application under Uniform Act section 25 may be brought by a beneficiary, a trustee, a party with a secured interest in the trust property or the appropriate government office.

[279] The issues are whether court authority to confer additional powers on trustees should prevail over contrary provisions in the trust instrument and whether to expand the list of potential applicants.

[280] According to the ULCC, Uniform Act section 25 is added out of "an abundance of caution." Given the wide powers in section 24, section 25 is not

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[83] *Trustee Act* states:

> **Powers conferred by court**
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> **21(1)** When in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition or any purchase, investment, acquisition, expenditure or other transaction is expedient in the opinion of the Court of Queen's Bench, but it cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court
>
> (a) may by order confer on the trustees, either generally or in any particular instance, the necessary power for the purpose, on any terms, and subject to any provisions and conditions that the court thinks fit, and
>
> (b) may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.
>
> **(2)** The court may, from time to time, rescind or vary an order made under this section or may make a new or further order.
>
> **(3)** An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

expected to be used very often. One example provided by the ULCC is that section 25 could be useful where the trust instrument withholds a particular power and circumstances change such that the trustee needs the power to further the best interests of the trust.

[281] Uniform Act section 25 could also be used to address a practical problem. In particular, even though a trustee has all the powers of a natural person under a trust instrument and pursuant to legislation, financial institutions are occasionally unwilling to cooperate with a trustee or engage in a transaction involving trust property. In these situations, it would be useful to allow a court order affirming or expressly conferring a particular power in a trustee.

[282] Uniform Act section 25 would also assist where a trust instrument does not include all the powers a trustee may need in the future. It would be beneficial to have a section in trustee legislation which describes the court's authority to confer additional powers.

[283] While the *Trustee Act* authorizes an application to be made by a trustee or a person beneficially interested in the trust property, the operation of Uniform Act section 25 allows an application to be made by a trustee, a beneficiary, a secured party who has a security interest in the trust property, or the appropriate government office. ALRI agrees with this expanded list.

CHAPTER 8

Duties of Trustees

A. Duty of Care

[284] Uniform Act section 26(1) specifies a general standard of care for trustees which includes good faith, compliance with trust terms and acting in the best interest of trust objects. Section 26(2) stipulates that trustees must exercise ordinary care, diligence and skill when dealing with trust property; section 26(2) is subject to section 31, which outlines the two-tiered standard of care. Section 26(3) sets a higher standard of care for professional trustees, in keeping with section 31. The policy basis for adopting the two-tier standard of care as proposed by the Uniform Act is discussed in more detail in Chapter 2. For reference, the relevant recommendation states:

> Recommendation 2
>
> The new Act should adopt the standards of care as proposed in Uniform Act sections 26 and 31 including the higher standard of care set out for professional trustees.

B. Conflicts of Interest

1. TRUSTEE'S CONFLICT OF INTEREST

[285] Uniform Act section 27 describes conflicts of interest in the context of a trust relationship. In particular, Uniform Act sections 27(1-2) specify the common law requirements that a trustee, as fiduciary, is to act solely in the interests of the objects of the trust and avoid situations where the trustee's interests conflict with those of the beneficiaries or the objects of the trust. Uniform Act sections 27(3-7) describe a process for a trustee to obtain court approval to act or decline to act in ways that ultimately benefit the objects of the trust, even though the trustee's act or omission creates a conflict of interest.

[286] The *Trustee Act* does not address conflicts of interest.

[287] The issue is whether to add Uniform Act section 27 to trustee legislation to incorporate the common law that a trustee may be authorized to act in ways that violate the conflict of interest provisions if authorized to do so by a trust instrument or court order.

[288] The ULCC comments note that section 27(3) addresses the practical problem that trustees are required to get consent from all beneficiaries before engaging in a conflict or profit situation. Sometimes a beneficiary may not have capacity; other beneficiaries may not be born yet. In addition, Uniform Act section 27 authorizes the court to retroactively validate trustee acts that are in conflict or which created profit for the trustee.

[289] Alberta courts regularly authorize trustees to act in conflict of interest situations as contemplated in Uniform Act section 27. Putting the conflict of interest provisions in trustee legislation would reduce the need to go to court in these fairly common situations and would assist the lay trustee who wants to purchase trust property in good faith.

[290] The Uniform Act provides for a trustee to make an application for an order allowing the trustee to act or decline to act due to conflict of interest, or excusing a trustee from liability for contravening the conflict of interest provision. ALRI is of the view that a qualified beneficiary should also be able to bring such an application.

[291] Including the conflict of interest provisions in legislation should reduce uncertainty and conflict. An application for court direction and advice on conflict of interest may hinge on whether the court finds an actual rather than a perceived conflict of interest. Moreover, a determination of conflict of interest usually only occurs after an allegation that a trustee has acted improperly. A provision like Uniform Act section 27 may increase clarity and certainty concerning conflict of interest matters, particularly for the lay trustee. Such a provision would help explain what is, and is not, permitted pursuant to conflict of interest rules.

RECOMMENDATION 29

The new Act should define conflict of interest and provide a process to allow a trustee to act in certain ways despite a conflict as proposed in Uniform Act section 27.

2. ROLE OF THE PUBLIC TRUSTEE AND ATTORNEY GENERAL

[292] Uniform Act section 27(6) adds the Attorney General and Public Trustee to the list of persons who may apply to the court to vary an original order authorizing a trustee to act despite a conflict of interest. As noted earlier, the sample draft legislation refers to the appropriate government office leaving the decision to government.

C. Duty to Report to Qualified Beneficiary and Duty to Provide Information

[293] Uniform Act sections 28 and 29 express the duty to report to qualified beneficiaries and to provide information. The *Trustee Act* does not include equivalent provisions. However, trustees have common law duties to report and provide information.[84] The issue is whether it would be beneficial to adopt provisions which describe and update these duties.

[294] The ULCC states that Uniform Act section 28 "augments the common law duty of a trustee." The duty to report applies during each fiscal period. Uniform Act section 1 defines fiscal period as the period set in the trust instrument for accounting purposes, or the period the trustee establishes for accounting purposes. If neither the trust instrument nor the trustee sets a period, the fiscal period is the calendar year.

[295] According to the ULCC comments on Uniform Act section 29(1), the legislated duty to report in section 28 is not "in lieu of a duty under the general law of trusts" that a trustee must respond in a timely fashion to a beneficiary's request for trust accounting or other information.

[296] The ULCC comments on Uniform Act section 29(2) indicate it is meant to provide court relief to beneficiaries who may not be getting the information they ask for or need because a trustee is exercising his or her discretion to withhold information pursuant to Uniform Act section 28(4). In this regard, Uniform Act section 29(2) does not limit the type of trust information that a trustee may be ordered to disclose.

[297] Uniform Act sections 28 and 29 accurately reflect the common law. In addition, section 28 is clearly worded and it would be easy for a trustee to understand the duty to report simply by reading this provision.

[298] Further, Uniform Act sections 28 and 29 seem consistent with the reporting requirements for estate administration established under the *Surrogate Rules*.[85] Although Uniform Act section 28 does not provide the same level of detail concerning the content and format for an accounting as the *Surrogate Rules*,

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[84] See Waters at 1119.

[85] *Surrogate Rules*, Part 3

As a point of clarification, it is important to note that a trustee who prepares a formal accounting for estate administration purposes must comply with the *Surrogate Rules*. This will not change, regardless of what trustee legislation may stipulate.

the section is drafted to set the framework for the information to be provided in a manner that is appropriate under the Act. If greater direction concerning the format of information to be provided under Uniform Act sections 28 or 29 proves necessary, regulations could be made under the trustee legislation.

[299] Uniform Act sections 28 and 29 are also consistent with the requirements under the *Estate Administration Act*. Under the *Estate Administration Act*, personal representatives have certain core tasks. One of the core tasks includes a requirement to regularly communicate with beneficiaries.[86]

RECOMMENDATION 30

The new Act should expand and clearly describe a trustee's duty to report to beneficiaries as proposed in Uniform Act sections 28 and 29.

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[86] *Estate Administration Act*, s 7, Schedule.

CHAPTER 9

Investment Powers of Trustees

A. Investment of Trust Property

[300] The Uniform Act section 30 sets out a brief, general statement of a trustee's investment powers. The Uniform Act stands in contrast to *Trustee Act* section 3. The difference between the *Trustee Act* and Uniform Act sections on investment raises several issues.

1. TRUSTEE SHOULD BE PRUDENT

[301] Although the Uniform Act provides a detailed scheme for how a trustee should carry out administrative, investment and other duties, it does not specify what constitutes prudent behaviour on the part of a trustee. In contrast, *Trustee Act* section 3, commonly referred to as the prudent investor rule, is a clearer scheme both from an information perspective and for assessing potential liability of trustees.[87] The policy basis for retaining the current prudent investor rule is

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[87] *Trustee Act* states:

> **Powers and duties with respect to investment**
>
> **3(1)** A trustee may invest trust funds in any kind of property if the investment is made in accordance with this section.
>
> **(2)** A trustee must invest trust funds with a view to obtaining a reasonable return while avoiding undue risk, having regard to the circumstances of the trust.
>
> **(3)** A trustee must review the trust investments at reasonable intervals for the purpose of determining that the investments continue to be appropriate to the circumstances of the trust.
>
> ...
>
> **(5)** Without restricting the matters that a trustee may consider, in planning the investment of trust funds a trustee must consider the following matters, insofar as they are relevant to the circumstances of the trust:
>
> (a) the purposes and probable duration of the trust, the total value of the trust's assets and the needs and circumstances of the beneficiaries;
> (b) the duty to act impartially towards beneficiaries and between different classes of beneficiaries;
> (c) the special relationship or value of an asset to the purpose of the trust or to one or more of the beneficiaries;
> (d) the need to maintain the real value of the capital or income of the trust;
> (e) the need to maintain a balance that is appropriate to the circumstances of the trust between
>   (i) risk,
>   (ii) expected total return from income and the appreciation of capital,
>   (iii) liquidity, and
>   (iv) regularity of income;
> (f) the importance of diversifying the investments to an extent that is appropriate to the circumstances of the trust;
> (g) the role of different investments or courses of action in the trust portfolio;
> (h) the costs, such as commissions and fees, of investment decisions or strategies;
> (i) the expected tax consequences of investment decisions or strategies.

discussed in more detail in Chapter 2. For reference, the relevant recommendation states:

> Recommendation 3
>
> The new Act should retain the current prudent investor rule, as expressed in *Trustee Act* section 3(2) [trustee must invest with the view of obtaining a reasonable return while avoiding undue risk], section 3(3) [trustee must periodically review the appropriateness of investments], and section 3(5) [matters that a trustee must consider when planning investments].

2. INVESTMENT IN SPECIFIC INSTRUMENTS

[302] Uniform Act section 30 further defines non-traditional investments and includes an option for trustees to invest in securities issued by their own organizations. Uniform Act section 30 allows for references to appropriate provincial legislation. Including the references to the appropriate Alberta legislation and definitions, Uniform Act section 30 states:[88]

> **Investment of trust property**
>
> **30(1)** A trustee may invest trust property in any form of property in which a prudent investor might invest, including a security issued by a mutual fund as defined in the *Securities Act*, RSA 2000, c S-4.

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[88] *Securities Act*, RSA 2000, c S-4 states:

> **Definitions**
>
> **1** In this Act
>
> (jj) "mutual fund" means
>
> (i) an issuer whose primary purpose is to invest money provided by its security holders and whose securities entitle the holder to receive on demand, or within a specified period after demand, an amount computed by reference to the value of a proportionate interest in the whole or in part of the net assets, including a separate fund or trust account, of the issuer, or
>
> (ii) an issuer that is designated as a mutual fund under section 10 or in accordance with the regulations,
>
> but does not include an issuer, or class of issuers, that is designated under section 10 not to be a mutual fund

Loan and Trust Corporations Act, RSA 2000, c L-20 states:

> **Interpretation**
>
> **1(1)** In this Act
>
> (qq) "trust corporation" means a body corporate incorporated or operated for the purposes of
>
> (i) offering its services to the public as executor, administrator, trustee, bailee, agent, custodian, receiver, liquidator, sequestrator, assignee or guardian or trustee of a minor's estate or of the estate of a mentally incompetent person, and
>
> (ii) carrying on the deposit-taking business, except in the case of a body corporate whose registration is subject to a term, condition or restriction prohibiting it from carrying on the deposit-taking business,
>
> but does not include a bank, a treasury branch, a loan corporation or a credit union;

> (2) Without limiting section 2(4), subsection (1) of this section does not authorize a trustee to invest in a manner that is inconsistent with the terms of the trust.
>
> (3) Without limiting subsection (1), a trustee may invest trust property in a common trust fund managed by a trust corporation as defined in the *Loan and Trust Corporations Act*, RSA 2000, c L-20, whether or not the trust corporation is a co-trustee.

a. Investment in mutual funds

[303] In the context of Uniform Act section 30, it is relevant to note that Uniform Act section 48 provides authority for trustees to invest in non-traditional forms of property as follows:

> Delegation of authority with respect to investment
>
> **48(4)** Investment in a mutual fund referred to in section 30 (1), a common trust fund referred to in section 30 (3) ***or a similar pooled fund*** is not a delegation of authority with respect to the investment of trust property [emphasis added].

In comparison, *Trustee Act* section 6 expands the concept of a mutual fund by adding the phrase "or similar investment."[89] Section 6 is part of Alberta's current prudent investor rule. Given the overall decision to adopt the Uniform Act, and the fact that it is more comprehensive, the Uniform Act provisions on investment in specific investments should be included in trustee legislation, rather than *Trustee Act* section 6.

b. Common trust funds

[304] The ULCC comments on Uniform Act section 30(3) indicate that allowing a trustee to invest in a common trust fund managed by a trust corporation that is also a co-trustee reverses the common law. The traditional common law approach establishing that a trustee who makes an investment in these circumstances would abdicate authority to the corporate co-trustee.

[305] According to the ULCC, the authority in Uniform Act section 30(3) is also specifically intended to include situations in which the trust corporation managing the common trust fund is not a co-trustee of the trust property

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[89] *Trustee Act* states:

> **Purchase of mutual fund units and delegation**
>
> **6** Investment in a mutual fund or segregated fund or in a similar investment set out in the regulations is not a delegation of investment authority with respect to the investment of trust funds.

invested. Implementing Uniform Act section 30(3) as written would change Alberta law in this regard.

[306] The issue is whether trustee legislation should be modified to change the law and authorize all trustees to invest in the common trust funds managed by trust corporations.

[307] The ULCC suggests that each jurisdiction should consider whether (a) a definition of common trust fund should be included in the trust legislation and (b) the local regulations concerning financial institutions allow national trust corporations to accept trust property in their common trust funds if the corporation does not have a trustee relationship to the property.

[308] According to the ULCC, the benefit of clarifying an unrestricted authority to invest trust property in common trust funds would make nationally managed common trust funds accessible as investment vehicles for more trust property.

[309] In order to implement Uniform Act section 30(3), the laws and definition concerning "common trust fund" under the *Loan and Trust Corporations Act* would need to be changed. The statutory definition of "common trust fund" limits the property invested in a common trust fund to estate and trust money in the care of the managing trust corporation.[90]

[310] An informal survey of trust corporations revealed that common trust funds are used by some, but not all, trust corporations. However, none of these common trust funds are open to public investment and there is no obvious reason why a trustee should be allowed to invest in them. In any event, common trust funds would not be a preferred investment choice for a trustee, given that the financial information and fund performance data is unavailable. In other words, it would be impossible for the trustee to investigate the soundness of the investment. Reforming trustee and other legislation to allow any trustee to invest in a common trust fund operated by a trust corporation is not practical and would not increase the number of prudent investment options.

[311] However, if a trustee employs an agent who is a trust corporation, it would be appropriate for that agent to be able to invest in a common trust fund

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[90] *Loan and Trust Corporations Act*, RSA 2000, c L-20 states:

> **Interpretation**
>
> **1(1)** In this Act
>
> (f) "common trust fund" means a fund maintained by a trust corporation in which money belonging to various estates and trusts in its care are combined for the purpose of facilitating investment.

that the agent manages. This is a practical change to the current law and allows a trustee to confidently invest funds in a common trust fund that the trustee, or a co-trustee, does not actually manage.

[312] Accordingly, the Uniform Act section 30(3) should be limited to reflect Alberta practice which allows investment in a common trust fund only if the trust corporation is a trustee of the trust property. Further, section 30(3) should expand Alberta practice slightly to allow investment in a common trust fund if the trust corporation is the agent of the trustee.

RECOMMENDATION 31

The new Act should provide that a trustee may invest trust property in a common trust fund managed by a trust corporation if the trust corporation is a trustee of the trust property or an agent of the trustee. However, common trust funds managed by trust corporations should not be open to investment by any trustee.

c. Investment in own securities by corporate trustee

[313] The Uniform Act section 30(4) includes two options governing corporate trustees:

> **Investment of Trust Property**
>
> Option 1:
>
> (4) Except as provided in subsection 30(3) a corporation that is a trustee must not invest trust money in its own securities.
>
> Option 2:
>
> (4) A corporation that is a trustee may invest trust money in its own securities.

[314] The *Trustee Act* was amended in 2006 to remove a previous prohibition on investment in a corporate trustee's own securities.[91]

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[91] The Schedule to the *Trustee Act* previously stated:

> **Schedule**
>
> **4(2)** No corporation that is a trustee shall invest trust money in its own securities or lend money on security of its own securities.

It is not clear that the policy implications of repealing the entire Schedule including section 4(2) were specifically considered in 2006. The intent of the 2006 amendment was to end the transition period that moved Alberta from a scheme of authorized investments set out in a list to a more flexible, modern regulatory approach.

[315] The ULCC comments on Uniform Act section 30(4) do not indicate why a corporate trustee should or should not be allowed to invest trust property in its own securities. The comments do state that Option 2 makes an additional investment vehicle available to the corporate trustee.

[316] In the past 10 years, there have been no reported cases decided in Alberta that involve corporate trustees investing in their own securities.

[317] The prohibition on a corporate trustee investing in its own securities no longer makes sense in the context of modern trust practice, particularly since many trust companies are now owned by banks and other diversified financial institutions. The former restriction in the *Trustee Act* does not need to be revived.

[318] In addition, the authority for a corporate trustee to invest in its own securities is often expressly granted in trust instruments that appoint corporate trustees. Including a provision such as Uniform Act section 30(4), Option 2 in trustee legislation, which allows a corporate trustee to invest in its own securities, will not change anything in terms of determining whether that is a prudent thing to do. The provision does not relieve a corporate trustee from the obligation to be prudent and make investment choices accordingly.

RECOMMENDATION 32

The new Act should allow a corporate trustee to invest trust funds in its own securities as proposed in Option 2 of Uniform Act section 30(4).

B. Standard of Care

1. TWO-TIERED STANDARD OF CARE

[319] Uniform Act section 31 outlines the two-tiered standard of care. The policy basis for adopting the two-tiered standard of care as proposed by the Uniform Act is discussed in more detail in Chapter 2. For reference, the relevant recommendation states:

> Recommendation 2
>
> The new Act should adopt the standards of care as proposed in Uniform Act sections 26 and 31 including the higher standard of care set out for professional trustees.

2. TRUSTEE NOT LIABLE IF OVERALL INVESTMENT STRATEGY PRUDENT

[320] Assessing a trustee's liability in Alberta is a fairly direct exercise. The assessment reviews whether the trustee's investment decision or course of action was reasonable by measuring it against the hallmarks of a prudent investor as stipulated in the *Trustee Act*.

[321] The Uniform Act changes the liability assessment approach to a less direct and more complex review of the trustee's investment or management plan. The first question in the uniform assessment scheme is whether the trustee's actions conformed to a plan. The second is whether the plan includes a reasonable assessment of risk and return. The final question is whether the plan would be adopted by a similarly situated prudent investor.

[322] The issue is whether proposed sections would be appropriate for Alberta.

[323] The ULCC comments indicate that Uniform Act section 32 is intended to provide for assessment of general liability in a way that reflects how modern trustees administer trusts. Modern trustees develop and adhere to investment plans and strategies to enhance trust value. In addition, Uniform Act section 32(2) requires a professional trustee to exhibit a higher standard of care by developing a better than average investment plan or strategy.

[324] However, the Uniform Act provides little guidance as to what should be included the trustee's plan. In comparison, the *Trustee Act* section 4(1) clearly states that a general assessment of trustee liability is conducted with reference to the prudency factors listed in *Trustee Act* section 3.[92] *Trustee* Act section 4(1) is preferred and a trustee's plan should continue to address the matters currently specified in *Trustee Act* section 3(5).

[325] In keeping with previous recommendations, trustee legislation should reflect the higher standard expected of professional trustees in investing trust property as provided in Uniform Act section 32(2).

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[92] *Trustee Act* states:

> **Trustee liability**
>
> **4(1)** A trustee is not liable for a loss in connection with the investment of trust funds that arises from a decision or course of action that a trustee exercising reasonable skill and prudence and complying with section 3 could reasonably have made or adopted.

RECOMMENDATION 33

The new Act should retain the general assessment of trustee liability based on whether the trustee acted in a reasonable, prudent manner.

C. Abolition of Common Law Rules – Anti-netting Rules

[326] Uniform Act section 33 defines and abolishes the anti-netting rules. The ULCC indicates that this section changes the common law and is necessary to support modern trust investment and management practices. Overall performance and net trust loss or gain are proposed as the appropriate benchmarks for assessing trustee liability and the associated damages.

[327] *Trustee Act* section 4(2) permits the court to take into account the overall performance of investments when determining damages for losses resulting from a trustee's actions.[93] However, the *Trustee Act* does not specifically mention the anti-netting or other common law rules which traditionally applied to the assessment of liability or calculation of damages.

[328] Alberta courts may take overall performance into account when assessing liability and damages. As such, the common law anti-netting rules have been effectively negated. However, these rules remain a source of confusion in practice. The situation would be clarified if the rules were expressly abolished in trustee legislation as proposed in Uniform Act section 33.

[329] That said, when compared to *Trustee Act* section 4(2), Uniform Act section 33(2) appears to limit judicial discretion inappropriately when assessing damages resulting from a breach of trust. Under the *Trustee Act*, and at common law, if a trustee is found generally liable for a breach of trust or duty, it is up to the court to determine whether it is fair to net losses against gains or whether the full extent of a particular loss ought to be recovered in damages from the trustee.

[330] Accordingly, trustee legislation should retain *Trustee Act* section 4(2). The anti-netting rules should also be expressly abolished as proposed in Uniform Act section 33; however, the exception for circumstances where the breach is associated with dishonesty or impropriety by a trustee should not be adopted.

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[93] *Trustee Act* states:

> **Trustee liability**
>
> **4(2)** A court assessing the damages payable by a trustee for a loss to the trust arising from the investment of trust funds may take into account the overall performance of the investments.

RECOMMENDATION 34

The new Act should clearly abolish the anti-netting rules for assessing liability and the damages resulting from a trustee's breach of trust while retaining court discretion to assess damages as proposed in Uniform Act section 33(1), the first part of section 33(2) and the judicial discretion as reflected in *Trustee Act* section 4(2).

D. Interpretation of Trust Terms

[331] The Uniform Act section 34 provides a transitional provision in respect of investment of trust property. If a trust instrument authorizes a trustee to invest trust property in investments that were permitted under the former *Trustee Act*, then the trust instrument is to be construed as authorizing the investments permitted under the new Act, unless the trust instrument includes contrary directions.

CHAPTER 10

Allocation of Income and Capital by Trustees

A. Definition

[332] The Uniform Act section 35 provides a definition of "outgoing" to be used in Part 4, Division 4 of the Act. "Outgoing" is defined as "an expenditure paid or incurred in administering a trust, including, without limitation, an expenditure arising from or made with respect to repairs, maintenance, insurance, taxes, security interests, debts, calls on shares, annuities and losses."

B. Duty to Act Impartially and Prudently

[333] The Uniform Act section 36 provides that nothing in the Division affects the duty of a trustee:

- To act impartially as between different classes of beneficiaries in the administration of a trust; or
- To invest prudently, in accordance with the standard of care that a prudent investor would exercise in making investments.

[334] The ULCC comments note that when there is more than one class of beneficiaries a trustee must invest carefully to ensure that the investments are not favoring one class over another. The trustee must invest with an "even hand." Uniform Act section 36 provides that nothing in the Division "displaces the duty of 'even hand', which exists under general trust law." Further, "this Division provides for the possibility of a total return investment regime for trustees, under which even-handed treatment is achieved without having to draw a strict distinction between income and capital accounts for trust property."

C. Abolition of Common Law Rules of Apportionment

[335] Uniform Act section 37 abolishes certain common law rules of apportionment. These rules require certain types of estate assets to be converted to authorized investments and address how income from those investments is to be distributed among income and capital beneficiaries. The ULCC states that

Uniform Act section 37 specifically abolishes the first and second branches of the rule in *Howe v Lord Dartmouth*, and the rule in *Re Earl of Chesterfields Trusts*. The ULCC commentary reviews these rules and indicates they are no longer appropriate because they result from a time when there was a statutory list of authorized investments deemed safe and prudent for protecting the value of trust property. Further, these rules unduly and unnecessarily restrict a trustee's ability to administer and manage trust property with a view to overall performance and maximizing the total return on trust property.

[336] The *Trustee Act* does not include these rules concerning the apportionment of trust property between income and capital assets. However, it is common knowledge in trust practice that the rules in *Howe v Lord Dartmouth* and *Re Earl of Chesterfields Trusts* do not apply in Alberta. Although it is not strictly necessary, it would clarify the law in this regard if these rules were expressly abolished in trustee legislation. This said, Uniform Act section 37, as currently drafted is confusing and should be modified to more clearly indicate the nature of the apportionment requirements that are no longer applicable.

D. Apportionment of Outgoings Between Income and Capital

[337] The Uniform Act section 38 deals with the apportionment of outgoings between income and capital. As noted, Uniform Act section 35 defines "outgoing" as "an expenditure paid or incurred in administering a trust, including, without limitation, an expenditure arising from or made with respect to repairs, maintenance, insurance, taxes, security interests, debts, calls on shares, annuities and losses."

[338] Section 38(2) gives trustees the ability to apportion expenses between income and capital, subject to certain limitations. Specifically, trustees must only allocate in the manner described in the section if the trustee considers such apportionment is:

- Just and equitable in the circumstances;
- In accordance with ordinary business practice; and
- In the best interests of the objects of the trust.

[339] Uniform Act section 38(3) provides that if an amount paid out of an income or capital account is not equal to the amount of an outgoing charged to the income or capital of the trust, then the trustee can allocate an amount

between income and capital accounts to recover or reimburse the payments made. This means that a trustee can transfer funds between income and capital accounts to make necessary adjustments after expenses are paid.

[340] Finally, Uniform Act section 38(4) provides that if trust capital is subject to depreciation, trustees may deduct from the income account an amount that is just and equitable in the circumstances, consistent with ordinary business practice, and in the best interests of the objects of the trust. They would then add that amount to the capital account to protect the trust property from loss.

[341] Uniform Act section 38 appears to be a practical and modern change to trustee law and gives trustees more discretion to act in the best interests of the trust. Indeed, such allocation is already common practice and many trustees already apportion outgoings between income and capital accounts, without realizing this is actually not allowed.

[342] Trustee legislation should allow the discretionary apportionment of an outgoing between income and capital by including Uniform Act section 38.

E. Discretionary Allocation Trust of Receipts and Outgoings

[343] The Uniform Act section 39 authorizes the trustee of a discretionary allocation trust to disregard the legal classification of trust assets as income or capital.

[344] There is no section in the *Trustee Act* that is similar to Uniform Act section 39. The issue is whether it is appropriate to eliminate the traditional classification rules for income and capital for discretionary allocation trusts.

[345] According to the ULCC comments, Uniform Act section 39 applies only when a trust instrument expressly provides that trust property is to be held on "discretionary allocation trust." Section 39 allows trustees to allocate incoming and outgoing assets justly and equitably. This result removes the requirement to classify incoming or outgoing assets as income or capital for trust accounting purposes. The ULCC notes that this provision changes the common law, especially as it relates to incoming assets which consist of corporate distributions to trustee-shareholders.

[346] The ULCC comments indicate that there are certain trusts which cannot be established as discretionary allocation trusts, including trusts for the exclusive use of a spouse, joint spousal or common law partner trusts, and alter ego trusts.

These excluded trusts are those which have rollover capability under the federal *Income Tax Act*.

[347] According to the ULCC, the two main advantages of Uniform Act section 39 are that it helps a trustee to "maintain an even hand among classes of beneficiaries" and promotes efficient investment because the trustee does not have to differentiate between various forms of trust property to satisfy a legal classification scheme.

[348] It is not clear that Uniform Act section 39 is necessary. The trustee's authority, as outlined in the two subsections, would be included in the power provisions of a trust instrument which establishes a discretionary trust, should a settlor decide to set it up that way. There may be some risk that putting these provisions in trustee legislation could make it mandatory that a trust instrument use the term "discretionary allocation trust" in addition to including the specific powers, in order for the trustee to be authorized to allocate receipts and outgoings in this manner. Further, since Uniform Act section 39 only applies if the discretionary allocation trust concept is already spelled out in the trust instrument, there could be future issues if the term "discretionary allocation trusts" goes out of fashion, while the specific powers detailed in trust instruments remain the same.

[349] Uniform Act section 39 appears to be a primarily technical provision intended to remove an out of date requirement that a trustee-shareholder must characterize and allocate incoming funds the same way they are characterized by the distributing corporation. For example, a corporate distribution of profit, dividend or income would be added to the income of the trust while a distribution of capital would be added to the trust capital.

[350] Although it is not necessary to include Uniform Act section 39 in trustee legislation, it would not do any obvious harm and may be useful in terms of furthering the total return investment concept discussed in the next section.

F. Total Return Investment

[351] Uniform Act section 40 provides authority for trustees to engage in investment activities with a view to maximizing the total return on trust property. It also allows trustees to disregard traditional rules concerning treatment and payout of returns on income and to administer the trust as a percentage trust over time.

[352] Uniform Act section 40 has 12 subsections:

- 40(1) defines the terms assets, fiscal period, specified percentage, total return investment policy, trustee and valuation period;
- 40(2) clarifies the application to endowments and similar gifts;
- 40(3) further specifies that in trust instruments or gift documents the phrases "on percentage trusts" and "total return" (when used in the context of investment) indicate total return investment policy;
- 40(4) authorizes a settlor to direct a trustee to adopt a total return investment policy;
- 40(5-6) allows trustees of a charitable trust and directors of a not-for profit to adopt a total return investment policy if the instrument or gift document is silent on the matter or does not expressly prohibit adoption of the policy;
- 40(7-10) describe what a trustee must do if a total return investment policy is adopted. In particular, the trustee must calculate the net value of trust assets at the start of each valuation period using the prescribed method; pay to the objects of the trust the specified percentage of the net asset value as such specified percentage is established in the trust document or by regulation; and apply trust income and capital to make the payments or otherwise as required by the act;
- 40(11) establishes when the valuation periods commence for various types of trusts and sets the duration of the period with a view towards time periods which are shorter than 3 years; and
- 40(12) provides authority to make regulations concerning the specified percentage and maximum valuation period applicable to trusts deploying a total return investment policy.

[353] The *Trustee Act* does not expressly authorize the specified percentage payout version of total return investing that is described in the Uniform Act. *Trustee Act* section 3(5) arguably authorizes trustees to implement total return investment strategies as may be prudent and appropriate depending on the

nature of the trust.[94] *Trustee Act* section 4(2) clearly contemplates that a trustee may be held liable on an overall performance of investment and trust asset management basis.[95]

[354] The issue is whether it is desirable to include provisions which enable a trustee to implement a total return investment strategy in trustee legislation.

[355] The ULCC comments indicate that Uniform Act section 40 is needed to implement a total return investment policy. In addition, the section "introduces" the percentage trust as a way to engage in a total return investment strategy. According to the ULCC, trustees of a percentage trust distribute a fixed percentage of a trust value in defined periods without distinguishing income from capital, but according to the usual trust scheme of payments from income first and capital second in the event of an income shortfall. Any remaining income amounts in excess of the total payout will be added to capital. A key feature of percentage trusts is that trust property must be valued on a regular basis.

[356] Although Uniform Act section 40 clearly describes a version of total return investment policy it seems that percentage trusts are not a practical option for private family trusts or similar options. According to the ULCC comments, this is because the federal *Income Tax Act* requires the distinction between income and

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[94] *Trustee Act* states:

> **Powers and duties with respect to investment**
>
> **3(5)** Without restricting the matters that a trustee may consider, in planning the investment of trust funds a trustee must consider the following matters, insofar as they are relevant to the circumstances of the trust:
>
> (a) the purposes and probable duration of the trust, the total value of the trust's assets and the needs and circumstances of the beneficiaries;
>
> (b) the duty to act impartially towards beneficiaries and between different classes of beneficiaries;
>
> (c) the special relationship or value of an asset to the purpose of the trust or to one or more of the beneficiaries;
>
> (d) the need to maintain the real value of the capital or income of the trust;
>
> (e) the need to maintain a balance that is appropriate to the circumstances of the trust between
>
> (i) risk,
>
> (ii) expected total return from income and the appreciation of capital,
>
> (iii) liquidity, and
>
> (iv) regularity of income;
>
> (f) the importance of diversifying the investments to an extent that is appropriate to the circumstances of the trust;
>
> (g) the role of different investments or courses of action in the trust portfolio;
>
> (h) the costs, such as commissions and fees, of investment decisions or strategies;
>
> (i) the expected tax consequences of investment decisions or strategies.

[95] *Trustee Act* states:

> **Trustee liability**
>
> **4(2)** A court assessing the damages payable by a trustee for a loss to the trust arising from the investment of trust funds may take into account the overall performance of the investments.

capital be maintained for tax calculation purposes. Trust accounts and records must reflect that reality. Further, the ULCC comments note that "[a]chieving the objectives of total return investment while satisfying the requirements of the *Income Tax Act* (Canada) would be possible only by adopting some quite complex accounting measures."

[357] The ULCC observes that adoption of a total return investment strategy is currently attractive where trust terms do not differentiate between income and capital, as is the usual case for discretionary allocation trusts and for charitable trusts and non-profit organizations which do not pay income tax.

[358] The ULCC comments also indicate that "it is hoped that by providing a legal framework … for total return investment, taxing authorities may be encouraged to adopt legislation that facilitates the use of this approach in a wide range of trust situations."

[359] The ULCC comments on Uniform Act section 40(12) describe a number of factors that should be considered when specifying the percentage of net trust asset value that is periodically paid out, including sustainability, protecting the value of trust assets and fair treatment of income and capital beneficiaries. The ULCC goes on to suggest that the estimated long-term real rate of return on investment (i.e. nominal return on investment less inflation) is a possible option for the "specified percentage" and gives reasons for the suggestion. In addition, according to the ULCC, the discount rate prescribed in some jurisdictions for calculating the present value of future losses when determining civil damages is a reasonable approximation of the long-term real rate of return.

[360] Uniform Act section 40(11)(c)(i) states that the valuation period for assets invested according to a total return investment strategy should be the shorter of three years, the period specified in the trust instrument, or the period set by the trustee. Section 40(12) allows the 3 year period to be varied by regulation.

[361] One of the reasons for implementing the Uniform Act total return investment provisions in Alberta's trustee legislation is that the strategy is consistent with the prudent investor rules. As well, the strategy is used by many charities and could be advantageous to other trusts which are not precluded from using total return investing by the *Income Tax Act*.

[362] As noted above, current federal tax policy prevents trusts with rollover capability and trusts which pay income tax from adopting total return investing. However, the Uniform Act provisions seem to be drafted in a manner that is consistent with language used in federal legislation in the event that Finance

Canada is inclined to change the tax legislation to allow total return investing to be used by more trusts.

[363] The total return investment scheme described in the Uniform Act is detailed and requires a trustee to do a number of specific things. It seems the detail is intended to be enabling for charities. It would also provide assistance to lawyers setting up trusts in that a settlor could simply state in the trust instrument that a trustee may implement a "total return investment plan" or "specified percentage" scheme, as these phrases would serve as a tie to the legislated details. The settlor could either go on and specify the whole scheme in the trust instrument or simply rely on the trustee to adopt what is described in the legislation.

[364] Uniform Act section 40 may make it easier and less expensive for a testator to establish a total return investment plan for a testamentary trust in his or her will. It could also be advantageous for a sophisticated settlor who may wish to use the trust instrument to specifically direct the trustee on the investment side, but is satisfied to simply go with a specified percentage annual payout scheme as described in the legislation.

RECOMMENDATION 35

The new Act should describe and authorize a total return investment strategy as proposed in Uniform Act section 40.

G. Application of Sections 39 and 40

[365] Uniform Act section 41 exempts some trusts from statutory requirements concerning accumulations and clarifies that the provisions concerning discretionary trusts and total return investing do not alter other powers. The issue is whether trustee legislation should clarify a trustee's authority to accumulate and power to encroach with respect to a total return investment strategy.

[366] Although not stated by the ULCC, the legislative intent of the Uniform Act section 41(1) seems to be to remove any potential for lingering requirements to classify trust property as income or capital in the context of discretionary allocation trusts and trusts which adopt the total return investment strategy.

[367] The ULCC comments indicate that statutory provisions concerning total return investment strategy and discretionary allocation trusts do not limit a trustee's power "conferred by trust instrument" to encroach on capital.

[368] According to Waters:[96]

> A "power of encroachment" is a term popular in Canadian usage; it refers to an authority for the holder of the power to draw upon capital, for whatever purpose, and so benefit a person who would otherwise have no right, or no immediate right, to capital.

[369] Uniform Act section 41(1) is necessary to fully implement a discretionary allocation trust or a percentage trust or total return investment strategy. In the event the general authority to accumulate remains in the *Perpetuities Act*, trustee legislation would need to reference the appropriate section in that Act. [97]

[370] Uniform Act section 41(2) does not change the existing law as it relates to the interaction between legislated authority and a trustee's power to encroach on capital.

RECOMMENDATION 36

The new Act should include provisions necessary to enable and clarify the total return investment policy as proposed in Uniform Act section 41.

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[96] Waters at 1172, note 1.

[97] *Perpetuities Act*, RSA 2000, c P-5.

CHAPTER 11

Distributive Powers of Trustees

A. Interpretation and Application

[371] Uniform Act section 42 is an interpretation and application provision for Part 4, Division 5. First, the section provides for each jurisdiction to include a definition of the term "spouse." Given the recommendations made in this chapter, there is no need for a definition of "spouse" to be included in Alberta trustee legislation.

[372] Second, the section provides that the Division does not apply to certain types of statutory trusts unless the trust instrument expressly provides otherwise. Finally, a direction in a trust instrument to accumulate income is not by itself evidence of a contrary intention sufficient to have a trust instrument prevail over Division 5.

B. Power to Pay Income to or for Benefit of Individual

[373] Uniform Act section 43 addresses the topic of payments of income arising under a trust. Uniform Act section 43 is similar to *Trustee Act* section 34.[98] However, Uniform Act section 43 also contains new provisions with respect to the recipients and purposes of payments.

> **Power to pay income to or for benefit of individual**
>
> **43(1)** If property is held by a trustee in trust for an individual, subject to any interest or charge affecting the trust property, the trustee may do any of the following as the trustee considers reasonable in the circumstances:

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[98] *Trustee Act* states:

> **Payment of income**
>
> **34(1)** When property is held by a trustee in trust for a person for any interest whatever, whether contingent or vested either defeasibly or indefeasibly, the trustee may in the trustee's discretion,
>
> (a) in the case of a beneficiary who is a minor, pay to the parent or guardian having authority to make significant decisions affecting the minor, or pay on behalf of the beneficiary, or
>
> (b) in the case of a beneficiary who is not a minor and not immediately entitled to payment of the income, pay to that beneficiary, or pay on behalf of the beneficiary,
>
> the whole or any part of the income of the property held in trust for the maintenance, education, benefit or advancement of the beneficiary.
>
> **(2)** The power conferred by this section may be exercised whether or not there is any other property or fund applicable for the same purpose or any person bound by law to provide for the beneficiary, but the power conferred by this section is subject to any prior interests or charges affecting the property.

(a) if the individual is a minor, pay all or part of the income earned from the property

  (i) to the parent, guardian or other person having custody or control of the individual, or

  (ii) towards the individual's past, present or future maintenance, education, benefit or advancement in life;

(b) if the individual has reached the age of majority and does not have an income or capital interest vested in interest and in possession, pay to, or for the benefit of, the individual all or part of the income earned from the property;

(c) if the individual has a child, spouse or former spouse and the trustee considers the payment to be to the benefit of the individual,

  (i) pay all or part of the income earned from the property towards the child's past, present or future maintenance, education, benefit or advancement in life, or

  (ii) pay to, or for the benefit of, the spouse or former spouse all or part of the income earned from the property.

(2) A trustee may pay the income earned from the trust property under subsection (1)

(a) whether the interest of the individual in the trust property is vested or contingent,

(b) whether or not there is any other fund available for the same purpose, or

(c) whether or not there is any person required by law to provide for the individual.

These differences are discussed below.

1. PAYMENTS TO A BENEFICIARY'S CHILD, SPOUSE OR FORMER SPOUSE

[374] Uniform Act section 43(1)(c) expands the trustee's authority to make payments to a beneficiary's child, spouse or former spouse. The ULCC comments concerning Uniform Act section 43(1)(c) do not indicate whether this is a change or codification of the common law. It is clear that an Alberta trustee does not have such authority under the *Trustee Act*.

[375] It is not recommended that a trustee's power of maintenance be expanded to making payments of income to a beneficiary's child, spouse or former spouse. There are a number of reasons for this conclusion. Giving such authority to a trustee would require a trustee to make onerous decisions that they are not called on to make today. The proposed expansion of trustee authority would also infringe on settlor and testamentary freedom. If a trust is established and intended to support individual A, it is not appropriate to change the outcome by legislating that individuals B or C may receive support.

[376] Further, giving a trustee authority to make payments to a spouse or former spouse could arguably convert trust property into matrimonial property. Expanding the trustee's authority to make such payments also runs the risk of creating what is known in the United States as a foreign non-grantor trust. In these situations, the law is concerned about trust or other provisions that confer a property interest in persons other than a beneficiary.

RECOMMENDATION 37

The new Act should not expand the trustee's authority to make payments of income to a beneficiary's child, spouse or former spouse.

2. PURPOSE OF PAYMENTS

[377] Uniform Act section 43 allows the trustee to make payments from income for the "benefit" of an adult beneficiary. In contrast, payments to a minor beneficiary (or to the child, spouse or former spouse of a beneficiary) may be made for maintenance, education, benefit or advancement in life. The *Trustee Act* similarly requires any payments to be made for the beneficiary's "maintenance, education, benefit or advancement." Arguably any payment of money would be a benefit to the recipient. It is proposed that payments should continue to be limited by the qualification that they be for the beneficiary's maintenance, education, benefit or advancement in life as currently required in the *Trustee Act*, and as required for payments to minors under Uniform Act section 43.

[378] Further, Uniform Act sections 43(2)(b) and (c) include new provisions that provide that a trustee may pay income to a beneficiary whether there is another fund available for the same purpose and whether there is any person required by law to support the beneficiary. These two sections may operate to limit trustee discretion in an unacceptable way, particularly when used in combination with Uniform Act section 78 (discussed in Chapter 17) which allows a beneficiary to

bring a court application for an order sanctioning a trustee for non-performance issues, in particular, a failure to "consider in good faith a power conferred on the trustee."

RECOMMENDATION 38

The new Act should retain the stipulation that the trustee may exercise discretion to make payments of income for a beneficiary's maintenance, education, benefit or advancement in life.

C. Power to Pay Amount from Capital for Benefit of Individual

[379] Uniform Act section 44 addresses a trustee's power of advancement from capital. Section 44 expands the trustee's power to advance and removes the requirement for court permission in some situations:

> **Power to pay amount from capital for benefit of individual**
>
> **44(1)** If property is held by a trustee in trust for an individual for any interest in capital, subject to this section and to any interest or charge affecting the trust property, the trustee may pay an amount in respect of the individual towards the following from the capital of the trust, as the trustee considers reasonable in the circumstances:
>
> (a) if the individual is a minor, towards the individual's past, present or future maintenance, education, benefit or advancement in life;
>
> (b) if the individual has reached the age of majority, towards the individual's benefit;
>
> (c) if the individual has a child or spouse and the trustee considers the payment or application to be to the benefit of the individual,
>
> (i) towards the child's past, present or future maintenance, education, benefit or advancement in life, or
>
> (ii) towards the spouse's benefit.
>
> **(2)** In order to pay an amount under subsection (1), the trustee may
>
> (a) create a security interest in a capital asset of the trust, or
>
> (b) otherwise transfer a capital asset of the trust.

(3) A trustee may pay an amount under subsection (1) or exercise the power under subsection (2) whether the interest of the individual in the capital

(a) is vested or contingent, or

(b) is in possession or in remainder or reversion.

(4) A trustee may not pay an amount under subsection (1) in respect of an individual if, as a result of that payment, the total of all amounts paid under that subsection in respect of the individual exceeds the greatest of the following:

(a) the amount specified under subsection (9);

(b) half of the value of the interest of the individual;

(c) an amount approved by the court in respect of the individual that is greater than that permitted under paragraphs (a) and (b).

(5) If the court approves an amount under subsection (4) (c) in respect of an individual and a trustee pays an amount under subsection (1) in respect of the individual, the trustee must promptly give written notice of the following to any other beneficiary who, at the time of the payment of the amount, is entitled to receive income from the capital from which the amount was paid:

(a) the terms of the order made by the court under subsection (4) (c);

(b) the amount paid in accordance with the order.

(6) A trustee may not pay an amount under subsection (1)

(a) if the income or accumulated surplus income is available under the terms of the trust for the maintenance, education, benefit or advancement in life of the individual or of the individual's child or spouse, unless the available income or accumulated surplus income is insufficient, or

(b) if the payment is detrimental to the pecuniary interest of a person who is entitled to a prior life or other interest, whether the interest is vested or contingent, in the amount to be paid, unless

(i) the person is of full capacity and consents in writing to the payment, or

(ii) the person is not of full capacity and the court approves the payment, on application by the trustee.

> **(7)** If an amount is paid under subsection (1) in respect of an individual, the individual's interest in the capital of the trust must be reduced by that amount.
>
> **(8)** If the individual referred to in subsection (7) does not have a vested interest in the capital of the trust when the amount is paid or applied under subsection (1), the reduction under subsection (7) is to be made when that interest is vested.
>
> **(9)** The [*regulation-making authority for the jurisdiction*] may specify by regulation an amount for the purposes of subsection (4) (a).

[380] A general power to advance on capital is usually included in a well-drafted trust instrument with specific restrictions, if any, as the settlor directs. Uniform Act sections 44 and 45 are generally a good representation of the concept. However, there are a number of issues regarding whether it is appropriate to replace *Trustee Act* section 37 with Uniform Act sections 44 and 45, including several new provisions proposed in the Uniform Act. These are dealt with below.

1. PAYMENTS TO CHILD OR SPOUSE

[381] The Uniform Act section 44(1)(c) allows the trustee to make payments from capital to a beneficiary's child or spouse. According to the ULCC, the trustee can do this if it is reasonable and the trustee thinks the advancement will benefit the beneficiary.

[382] As recommended earlier with respect to payments from income, this authority goes beyond the *Trustee Act* and is not appropriate for adoption in Alberta. The same conclusion applies with respect to payments from capital.

RECOMMENDATION 39

The new Act should not expand the trustee's authority to include making payments of capital to a beneficiary's child or spouse.

2. PURPOSE OF PAYMENTS

[383] The Uniform Act section 44(1) allows payments from capital to be made for a minor beneficiary's maintenance, education, benefit or advancement in life. In contrast, *Trustee Act* section 37 only permits payments for a beneficiary's

maintenance or education.[99] For consistency, trustee legislation should permit payments from capital for the beneficiary's maintenance, education, benefit or advancement in life. As noted in relation to section 43, the payment for a beneficiary's maintenance, education, benefit or advancement in life should apply to both a beneficiary who has not reached the age of majority and a beneficiary who has.

3. SECURITY INTEREST AND CAPITAL

[384] Uniform Act section 44(2)(a) permits a trustee to enable advancement by creating a security interest in trust property. The *Trustee Act* does not have a similar provision.

[385] The power to create a security interest in trust property seems appropriate in the modern context for a trustee to be able to advance and fulfill terms of the trust without physically dissipating the capital assets.

4. PAYMENT WITHOUT COURT APPROVAL

[386] The Uniform Act section 44(4) dispenses with the requirement for court approval of payments from capital in some situations. The general comments on Uniform Act section 44 indicate that the power of advancement is usually exercised for the benefit of minors or adults with special needs. However, the proposed legislation does not address court review on this basis but, rather, excludes court review based on a percentage value or dollar value.

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[99] *Trustee Act* states:

> **Sale of property to provide maintenance and education**
>
> **37(1)** When
>
> (a) any property either real or personal is held by a trustee in trust for a person for any interest whatever, whether contingent or vested either defeasibly or indefeasibly, and
>
> (b) the income arising from the property is insufficient for the maintenance and education of the beneficiary,
>
> the trustee, with the permission of the Court of Queen's Bench, to be obtained on application, may sell and dispose of any portion of that real or personal property and pay the whole or any part of the money arising from the sale to the guardian, if any, of the beneficiary or otherwise apply it for or toward the maintenance or education of the beneficiary.
>
> **(2)** When the whole of the money arising from the sale of the real or personal property is not immediately required for the maintenance and education of the beneficiary, then the trustee
>
> (a) shall invest the surplus money and the resulting income from it from time to time in authorized investments,
>
> (b) shall apply that money and the proceeds from it from time to time for the education and maintenance of the beneficiary, and
>
> (c) shall hold all the residue of the money and interest on it not required for the education and maintenance of the beneficiary for the benefit of the person who ultimately becomes entitled to the property from which that money and interest arise.
>
> **(3)** This section applies to trusts created by instrument or otherwise on or after January 1, 1975.

a. Nature of interest

[387] The combined effect of Uniform Act sections 44(3) and (4) is to allow certain payments from capital without court approval, regardless of whether the capital beneficiary's interest is vested or otherwise. The ULCC comments also indicate that, where payment can be made without court approval, a trustee need not get the consent of a beneficiary whose interest might be negatively affected by the advancement.

[388] While the *Trustee Act* section 37 allows for payments from capital whether the beneficiary's interest is contingent or vested and defeasibly or indefeasibly, all such payments require court approval. It is not clear if the consent of other beneficiaries is a factor considered by the Alberta court when reviewing a proposed advancement.

[389] The prospect of making payments from capital without court approval to a beneficiary whose interest is contingent is not an appropriate development at this time. Any such payments from capital should still require court approval and appropriate notice. However, allowing a trustee to make payments from capital to a beneficiary with a vested interest without court approval is a modern and sensible development in the law that allows trustees to appropriately address changing circumstances through the life of a trust. Thus this discretionary power should be given to trustees.

RECOMMENDATION 40

The new Act should allow a trustee to make a payment from capital to a beneficiary with a vested interest without court approval.

RECOMMENDATION 41

The new Act should retain the requirement for court approval for a trustee to make a payment from capital to a beneficiary with a contingent interest.

b. Value of payment

[390] Uniform Act section 44(4) limits the amount that can be paid from capital without court approval to the greater of half the value of the beneficiary's interest or a dollar value set by regulation. The ULCC suggests $25,000 as the initial dollar value to be set by regulation.

[391] The *Trustee Act* does not provide for any payment from capital without court order.

[392] In general, allowing the trustee discretion to make certain payments from capital without court order would streamline trust practice and reduce court costs. However, the limitations set out in Uniform Act section 44(4) are too broad.

[393] The practice is that the trustee has discretion in the exercise of a power of advancement, subject to the terms of the trust. It would not be advantageous to legislate a dollar amount as that amount risks becoming a default measure of, or limit on, the trustee's discretion. In addition, when a trust instrument is silent in terms of whether the trustee has discretion concerning advancement, it is not entirely clear that the trustee has discretion to advance.

RECOMMENDATION 42

The new Act should not adopt a percentage value or dollar value basis for making payments from capital without court approval.

5. INTERACTION WITH TRUST INSTRUMENTS

[394] Uniform Act section 2(5) does not include section 44 in the list of provisions that prevail over contrary provisions in a trust instrument. Uniform Act section 44 is very detailed and specific and raises the risk that it may be seen to fill in where a trust instrument is silent. In other words, it may be hard to limit a trustee's power of advancement to the terms of the trust instrument, particularly if there is no obvious conflict between them.

[395] This point goes to the policy question of whether legislation should attempt to fill gaps which may or may not be the result of inadequate drafting. A trust instrument's silence on a particular matter is not necessarily a gap. Sometimes one needs to go to court because it is not possible to draft for every eventuality.

[396] The problem that Uniform Act section 44 is intended to solve is not entirely clear. In particular, many trust instruments give a power of advancement and yet the matter rarely shows up in court. It does not seem that trustees go to court on a regular basis for direction concerning payments from capital under the existing legislation. Lawyers use the trustee legislation primarily to advise and inform clients when preparing trust instruments.

[397] Further, trustee legislation should facilitate the carrying out of a settlor's instructions and not simply authorize whatever makes the trustee's life easier. Uniform Act section 44 is akin to varying the terms of a trust and there are other statutory options for accomplishing that goal.

[398] The power of advancement should be described in legislation as discretionary and without reference to a dollar amount. Further, it should be subject to the terms of the trust instrument. This point is particularly important since beneficiaries will have rights elsewhere under the new legislation to take a trustee to court to challenge how trust property is being administered and distributed.

[399] In order to clarify that the statutory power of advancement is subject to the terms of the trust instrument, a provision similar to *Trustee Act* section 35(6) might be appropriate.[100]

RECOMMENDATION 43

The new Act should provide that court discretion to advance from capital as proposed in Uniform Act section 44 is subject to and limited by any contrary provision of a trust instrument.

6. LIMITATIONS ON PAYMENT

[400] Uniform Act section 44(6) continues the requirement stipulated in *Trustee Act* section 37(1)(b) that a trustee may advance from capital only if the income or accumulated surplus income from trust assets are insufficient to provide for a beneficiary's maintenance, education, benefit or advancement in life. Uniform Act section 44(6)(b) also prohibits payments from capital to a beneficiary that would be detrimental to the pecuniary interest of another individual with a prior life or other interest in trust property, unless that other person consents to the advancement.

[401] The ULCC comments on section 44(6) indicate that the Uniform Act continues to favour the use of income for maintenance, education, benefit and advancement of beneficiaries. Accordingly, that income must be insufficient or unavailable due to the terms of the trust instrument before capital assets could be

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[100] *Trustee Act* states:

> **Accumulations**
>
> **35(6)** Section 34 and this section have effect if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument and the provisions contained in it.

sold or encumbered. The ULCC comments do not state whether the consent requirement in section 44(6)(b) is new or reflects the common law.

[402] One of the reasons to put the additional restriction in trustee legislation is to clearly stipulate that the trustee must consider the pecuniary interests of other trust beneficiaries and obtain consent for payments from capital which would have a negative effect on those interests.

[403] The limitations on trustee discretion found in Uniform Act section 44(6) are appropriate and should be adopted. However, no further statutory conditions or restrictions should be placed on the trustee's exercise of discretion. In particular, as noted above, there should not be a percentage value or dollar value cap on advancements.

7. DEDUCTION FROM INTEREST

[404] The Uniform Act sections 44(7-8) state that a beneficiary who receives payment from capital will have their vested interest in the capital reduced accordingly. If the individual's interest in the capital is not vested at the time payment is made, the reduction occurs when the interest vests. The ULCC comments indicate that these provisions reflect the common law "hotchpot" principle.

[405] One of the reasons to include this principle in Alberta legislation is that it gives a clear statement of the principle and provides notice that payments from capital must be tracked and accounted for and interests in trust property adjusted accordingly over time.

D. Conditions on Payment from Capital

[406] Uniform Act section 45 gives the trustee powers to place or waive conditions on advancements to a beneficiary. Section 45(5) also absolves the trustee from liability for losses to trust property due to advancement transactions, provided the trustee acted in accordance with the duty of care described in Uniform Act section 26.

[407] The ULCC comments indicate that Uniform Act section 45 is new and changes the common law. The only remedy a trustee currently has if a beneficiary is misusing payments from capital is to stop payments. According to the ULCC, section 45 is needed to give trustees more control over how advances are used. The conditions a trustee can place on an advance are not limited in the

legislation. Some examples of conditions are set out in the section and include requirements that the beneficiary repay the amount, pay interest or provide security. The trustee also has discretion to waive any condition. Further, if repayment is the condition and repayment is made, the beneficiary's interest in the capital property will remain as if the advance was never made.

E. Payment or Transfer in Relation to Minor or Represented Adult

[408] Uniform Act section 46 provides that a trustee can transfer money or securities to the Public Trustee if a minor or incompetent individual does not have a guardian. As noted earlier, it will be up to government to determine the appropriate government office.

CHAPTER 12

Delegation by Trustees

A. Delegation to an Agent

[409] The Uniform Act provides for delegation regarding investment of trust funds and administrative functions. The Uniform Act also clarifies what may not be delegated. Aside from delegation regarding investment of trust funds, the *Trustee Act* is silent as to delegation

[410] The issue is whether the Alberta legislation should be updated to more clearly reflect the common law of agency and trustee principles which apply to modern trusts.

1. WHAT MAY NOT BE DELEGATED

[411] The ULCC comments on Uniform Act section 47 explain that the common law generally prohibits delegation of trustee functions which involve an exercise of discretion. It is appropriate to include this prohibition in new trustee legislation.

2. WHAT MAY BE DELEGATED

a. Investment authority

[412] To the extent that the *Trustee Act* deals with delegation it is limited to investment powers.[101] In particular, section 5(2) states "A trustee may delegate to

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[101] *Trustee Act* states:

> **Delegation of investment authority**
>
> **5(1)** In this section, "agent" includes a stockbroker, investment dealer, investment counsel and any other person to whom investment responsibility is delegated by a trustee.
>
> **(2)** A trustee may delegate to an agent the degree of authority with respect to the investment of trust funds that a prudent investor might delegate in accordance with ordinary investment practice.
>
> **(3)** A trustee who delegates authority under subsection (2) shall exercise prudence in
>
> (a) selecting the agent,
>
> (b) establishing the terms of the delegated authority, and
>
> (c) monitoring the performance of the agent to ensure compliance with the terms of the delegation.
>
> **(4)** A trustee who has delegated authority to an agent under subsection (2) and has complied with subsection (3) and the regulations is not liable for the decisions or actions of that agent.
>
> **(5)** Where investment authority has been delegated to an agent by a trustee and the trust suffers a loss because of the agent's breach of the terms of the agency contract, damages for the loss may be recovered from the agent in an action
>
> (a) by the trustee, or

Continued

an agent the degree of authority with respect to the investment of trust funds that a prudent investor might delegate in accordance with ordinary investment practice."

[413] Uniform Act section 48(1) provides that a trustee may delegate authority to an agent "that a prudent investor might delegate in accordance with ordinary business practice." The issue is whether the Uniform Act intends to set a new "business" standard and parameters for delegation of investment authority to an agent.

[414] The wording change from investment practice to business practice is likely not intentional; there is no justification for the change expressed in the comments. Further, Uniform Act section 48(2) stipulates that the trustee is to determine and communicate investment objectives to the agent, which is consistent with an investment practice standard.

[415] Prudent investment practice is different from prudent business practice. See for example the following discussion in the Canadian Association of Pensions Supervisory Authorities, *Guideline No. 6, Pension Plan Prudent Investment Practices Guideline*:[102]

> Prudent investment practices require appropriate processes that include due diligence in selecting, reporting and monitoring investments.
>
> The goal of the investment function in the pension context is to generate returns taking into account the plan's liabilities and cash flow needs to meet short term and long term obligations, as well as the risk tolerances of the affected parties.
>
> The plan administrator is responsible for the investment function. The manner in which assets are invested, and the way the investments are managed and supervised by the plan administrator are crucial to the success of the pension fund and delivery of the pension promise. The investment management function should be undertaken in accordance with the prudential principles of security and cash flow management, using appropriate risk management concepts. The plan administrator needs to achieve a balance between risk and reward considerations.

(b) by a beneficiary of the trust if the trustee fails to commence an action within a reasonable time after acquiring knowledge of the breach.

[102] Canadian Association of Pensions Supervisory Authorities, *Guideline No 6, Pension Plan Prudent Investment Practices Guideline* (November 15, 2011) at 3.

[416] Prudent business practice is a less specific standard and likely to vary widely depending on the nature and objectives of any particular business. See for example, the definition of business practice: "A method, procedure, process, or rule employed or followed by a company in pursuit of its objectives. Business practice may also refer to these collectively."[103]

b. Administrative functions

[417] Uniform Act section 47 clarifies that the trustee may delegate any administrative duty or power to an agent if it is reasonable and prudent. The agent may be in Alberta or outside the province. Section 47(2) describes, without limitation, examples of administrative actions that can be delegated:

- Executing documents;
- Transferring money or other property; or
- Providing receipts for property or money received by the trustee.

Uniform Act section 47(3) prohibits a trustee from delegating distributive powers or the performance of trustee's duties regarding investment objectives. Section 47 can be overridden by a contrary intention expressed in a trust instrument.

[418] While the intent to clarify what may be delegated is appropriate, the language of Uniform Act section 47(1) is unclear. Stating that an agent may exercise "*any power or perform any duty* in the administration of a trust" uses the same language of powers and duties in proscribing what may not be delegated in Uniform Act section 47(3). This ambiguity is not clarified by the short list of three administrative tasks in Uniform Act section 47(2).

[419] Trustee legislation would be clearer if the matters that can be delegated to an agent were described in different language from that used to express what cannot be delegated. For example, a phrase such as "administrative functions" might clarify the distinction.

3. WHO MAY BE APPOINTED

[420] Uniform Act section 49(2) provides generally that a trustee must personally select the agent and must be satisfied of the agent's suitability for appointment.

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[103] Online: <www.businessdictionary.com/definition/business-practice.html>.

a. Co-trustee

[421] The *Trustee Act* is silent on the matter of delegating authority to a co-trustee. In contract, Uniform Act section 49(6) states, "A trustee may appoint a co-trustee as an agent only if the appointment would have been reasonably prudent if the co-trustee had not been a co-trustee."

[422] The policy issue is whether to clarify trustee legislation by specifying when a trustee may appoint a co-trustee as agent.

[423] The ULCC comments indicate that the co-trustee agent provision is new. It is included in the Uniform Act to preserve the common law rule that a trustee may not delegate distributive authority to a co-trustee because co-trustees must act jointly in distributive matters. According to the ULCC, if a trustee appoints a co-trustee as agent to exercise distributive powers and duties, the common law holds that the appointing trustee is abrogating his or her trustee duties. However, a trustee may delegate administrative functions to a co-trustee if the delegation would be reasonable and prudent. While not discussed in the ULCC comments, delegation to a co-trustee under section 49(6) is not limited to administrative functions but would, presumably, also include investment authority.

[424] Trustees are generally allowed by terms in trust instruments to delegate to a co-trustee, if it would be prudent to do so. It would be clearer if the express authority to delegate administrative functions to a co-trustee were included in the legislation.

b. Agent outside Alberta

[425] The Uniform Act section 47(1) refers to the appointment of an agent "within or outside the province" to take care of administrative functions. There is no reference to the agent's location in Uniform Act section 48 regarding investment authority, nor is the agent's location mentioned in *Trustee Act* section 5. Mentioning the agent's location in one section but not others may lead to interpretation problems.

[426] Both Uniform Act section 47 and 48 refer to prudency by the trustee in appointing an agent, as does section 49. In some instances, appointing an agent in Alberta will be prudent, in others not. Moreover, the ability to appoint an agent in another jurisdiction is inherently practical. However, as agents have been appointed outside Alberta for investment purposes under *Trustee Act*

section 5 it is unlikely that authority to appoint an out of province agent needs to be mentioned expressly.

4. LIABILITY FOR AGENTS

[427] The *Trustee Act* only provides for delegating investment authority to an agent and consequent liability for loss to the trust. [104] The Uniform Act clarifies that a trustee may also delegate administrative functions to an agent. However, in addressing liability, the Uniform Act creates confusion in retaining the *Trustee Act* approach and adding an additional provision. The *Trustee Act* and Uniform Act are substantially similar in terms of describing trustee liability for investment losses. The issue is how to clarify the relevant provisions in trustee legislation.

a. Trustee not liable

[428] Uniform Act sections 48 and 49 provide that the trustee is not liable for loss in value of trust property due to actions of an agent or others except in specified circumstances.

b. Trustee liable

Failure in selecting or supervising agent

[429] Uniform Act sections 49(2) and (3) require a trustee to personally select an agent and to exercise reasonable and prudent supervision over the agent. Uniform Act section 49(4) states that a trustee is liable for a loss to trust property caused by an agent if the trustee fails in selecting or supervising the agent and the loss is consequent on the trustee's failure.

Failure to set prudent terms or limits on agent's investment authority

[430] Uniform Act section 48(2) requires a trustee to exercise prudence in setting the terms and limits of the agent's authority. Under section 48(3) the trustee will

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[104] *Trustee Act* states:

> **Delegation of investment authority**
>
> **5(2)** A trustee may delegate to an agent the degree of authority with respect to the investment of trust funds that a prudent investor might delegate in accordance with ordinary investment practice.
>
> **(3)** A trustee who delegates authority under subsection (2) shall exercise prudence in
>
> (a) selecting the agent,
>
> (b) establishing the terms of the delegated authority, and
>
> (c) monitoring the performance of the agent to ensure compliance with the terms of the delegation.
>
> **(4)** A trustee who has delegated authority to an agent under subsection (2) and has complied with subsection (3) and the regulations is not liable for the decisions or actions of that agent.

be liable for a failure in this regard if the loss is consequent on the trustee's failure.

Failure to determine investment objectives

[431] Uniform Act section 48(2) also requires a trustee to determine investment objectives for the trust and acquaint the agent with the objectives. Under section 48(3) the trustee will be liable for a failure in this regard if the loss is consequent on the trustee's failure.

c. Discussion

[432] The *Trustee Act* and Uniform Act describe similar parameters for relieving a trustee of liability for decisions or actions of an agent, but the *Trustee Act* does so in more general terms, within a single section.

[433] The single section approach to describing trustee liability that is reflected in *Trustee Act* section 5 is preferred from a clarity perspective. Further, *Trustee Act* section 5 is part of the Alberta prudent investor rule package, is well understood and has been widely incorporated into other legislation. Legislative provisions concerning trustee liability for the actions of an agent and others should be updated as necessary and remain consistent with the prudent investor approach in the current Act.

RECOMMENDATION 44

The new Act should clearly specify the factors which make a trustee liable for losses to trust property controlled by an agent consistent with Alberta's prudent investor rules, in particular, by retaining *Trustee Act* sections 5(2-4).

5. LIABILITY OF AGENTS

[434] The *Trustee Act* provides for the liability of agents.[105] The Uniform Act has no comparable sections. The issue is whether the existing agent liability provisions should be continued in modern trustee legislation.

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[105] *Trustee Act* states:

> **Delegation of investment authority**
>
> **5(5)** Where investment authority has been delegated to an agent by a trustee and the trust suffers a loss because of the agent's breach of the terms of the agency contract, damages for the loss may be recovered from the agent in an action
>
> (a) by the trustee, or

Continued

[435] *Trustee Act* section 5(5) indicates that determination of agent liability for trust property loss and appropriate damages is grounded in contract law and associated agency principles. Section 5(5)(b) permits a beneficiary of the trust to take action in the event the trustee, who is arguably the contracting party, fails to do so.

[436] One of the benefits of retaining a provision concerning agent liability for trust losses is that agents are put on notice that they can be held accountable not only by those they contract with, but also by those to whom their counterparty owes a duty of trust.

[437] The existing agent liability provision, *Trustee Act* section 5(5), is an important part of the Alberta prudent investor package and should be continued. One of the advantages of the agent liability section is that it prevents an agent from attempting to hide behind the delegation. Another is that it expressly authorizes a beneficiary to take action against an agent, which is a direct and easy way for a beneficiary to resolve the contract issue without the need to rely on negligence or some other mechanism.

RECOMMENDATION 45

The new Act should retain the existing provisions concerning an agent's liability for losses to trust property.

6. SUB-DELEGATION BY AGENT

[438] The *Trustee Act* is silent on the issue of sub-delegation of trustee authority by an agent. Uniform Act section 49(7) provides that an agent may delegate to another, subject to any restrictions on sub-delegation specified by the trustee. Section 49(7) is not limited and sub-delegation would be possible for both investment authority and administrative functions.

[439] Uniform Act sections 49(8)-(9) require the agent to personally select the sub-agent, be satisfied that the sub-agent is suitable to perform the delegated functions and "exercise reasonable and prudent supervision over" the sub-agent.

(b) by a beneficiary of the trust if the trustee fails to commence an action within a reasonable time after acquiring knowledge of the breach.

Regulations
8 The Minister may make regulations

...

(b) respecting the terms of a delegation of authority by a trustee to an agent under section 5.

[440] The ULCC comments indicate that Uniform Act provisions change the common law, which prohibits sub-delegation of trustee duties and powers without the express permission of the trustee. The ULCC further states that it is not clear that a trustee may authorize sub-delegation without an express power to do so in the trust instrument.

[441] The issue is whether trustee legislation should be used to change the common law and permit an agent to further delegate trustee duties and powers to another person.

[442] According to the ULCC, the reason for the current restrictions on sub-delegation is to avoid situations where a trustee loses control as to how powers or duties are carried out. The reason given for the change is that sub-delegation is often a practical necessity.

[443] Although there is some risk that a trust may be mismanaged by a sub-agent and it would be preferable to disallow sub-delegation of trustee functions unless necessary in limited circumstances, sub-delegation is an essential feature of modern trust practice in Alberta. The practice is common, especially for investing assets of high net value trusts and trusts involving trust companies.

7. DEPOSIT OF TRUST PROPERTY FOR SAFEKEEPING

[444] Uniform Act section 49(5) also allows a trustee to deposit trust property with a financial institution or other person for safekeeping. Though included with the provisions on delegation to an agent, section 49(5) does not clearly establish an agency relationship but seems more akin to bailment.

[445] The distinction between Uniform Act section 49(5) and the other delegation provisions is also apparent in the basis for trustee liability. Section 49(5) requires the trustee to exercise prudence in selecting and supervising the person or financial institution with whom the trust property is deposited. The trustee will be liable in relation to failure in selecting or supervising the financial institution or person. However, section 49(5) does not require that the loss result from the trustee's failure as is otherwise the case under sections 48 and 49. Liability flows through to the trustee if it was caused by the conduct of the financial institution or person.

[446] Uniform Act section 49(5) is similar to *Trustee Act* section 23, with Uniform Act section 49(5) being a more modern provision.[106] Uniform Act section 49(5) clarifies that putting trust property in a financial institution or other place for safekeeping is not the same as delegating authority to an agent and describes an appropriate standard for trustee liability in these situations. Although currently located with the agency provisions, section 49(5) should not be included within the section of the Act that deals with delegation to agents.

[447] A draft provision akin to Uniform Act section 49(5) is included in the sample draft Act.

B. Delegation by Power of Attorney

[448] The Uniform Act section 50 allows a trustee to delegate by power of attorney. As discussed in greater detail in Chapter 2, both section 50 and section 8 provide for a trustee to confer authority on another for a temporary period. The intention behind having two separate provisions is not clear and the recommendation was made to create a single scheme to address a trustee's need to authorize someone else to act for a specified period of time. Sample draft legislation to implement that recommendation is included in Part 2, as the person appointed is effectively a substitute trustee rather than an agent. However, the discussion was also very clear that delegation by power of attorney should not be adopted in Alberta. For reference the relevant recommendation states:

> Recommendation 7
>
> The new Act should not provide for the delegation of trust powers by power of attorney.

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[106] *Trustee Act* states:

> **Appointment of agents**
>
> **23(1)** A trustee may appoint a barrister and solicitor to be the trustee's agent to receive and give a discharge for any money or any valuable consideration or property receivable by the trustee under the trust, and no trustee is chargeable with breach of trust by reason only of the trustee having made or concurred in making the appointment.
>
> **(2)** If a trustee permits the money, valuable consideration or property to remain in the hands or under the control of the barrister and solicitor for a period longer than is reasonably necessary to enable the barrister and solicitor to pay or transfer it to the trustee, nothing in this section exempts the trustee from any liability that the trustee would have incurred if this section had not been enacted.
>
> **(3)** A trustee may appoint a bank or treasury branch or barrister and solicitor to be the trustee's agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance or otherwise, and no trustee is chargeable with a breach of trust by reason only of the trustee having made or concurred in making the appointment.
>
> **(4)** If a trustee permits the money to remain in the hands or under the control of the bank or treasury branch or barrister and solicitor for a period longer than is reasonably necessary to enable the bank, the treasury branch or barrister and solicitor to pay it to the trustee, nothing contained in this section exempts the trustee from any liability that the trustee would have incurred if this section had not been enacted.

CHAPTER 13

Miscellaneous Powers and Duties of Trustees

A. Liability for Trust Property

[449] Uniform Act section 51 provides for a trustee's liability for trust property. A trustee will not be liable for a co-trustee's breach of trust unless the trustee participated in the breach of trust through his or her own acts or omissions. Further, section 51(2) states that, subject to a few sections that provide for trustee liability for an act or omission of the trustee's agent, a trustee will not be liable for a loss in relation to trust property simply because the trustee signed a receipt with a co-trustee due to a requirement in the trust instrument that the trustees act unanimously.

[450] This particular provision is not new to Alberta. A very similar provision is found in *Trustee Act* section 25.[107]

[451] The ULCC notes that section 51 provides that liability for a trustee does not arise simply from the status of being a trustee. In order to be liable a trustee must have participated in a breach by act or omission. The ULCC notes that this means that if a trustee "is aware of a co-trustee's breach of trust, resulting in loss to the trust property and does nothing to prevent or correct the loss when it would have been possible to do so, the trustee is liable to the beneficiaries for an independent breach of trust by reason of his or her own omissions."

[452] Further, the ULCC comments indicate that section 51(2) clarifies that trustees are not liable merely for signing a receipt with a co-trustee to satisfy a requirement for unanimity.

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[107] *Trustee Act* states:

> **Liability of trustee**
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> **25** A trustee is chargeable only for money and securities actually received by the trustee, notwithstanding the trustee signing any receipt for the sake of conformity, and is answerable and accountable only for the trustee's own acts, receipts, neglects or defaults and not for
>
> (a) those of any other trustee,
>
> (b) any banker, broker or other person with whom any trust money or securities may be deposited,
>
> (c) the insufficiency or deficiency of any securities, or
>
> (d) any other loss, unless it happens through the trustee's own wilful default,
>
> and may reimburse the trustee or pay or discharge out of the trust property all expenses incurred in or about the execution of the trustee's trust or powers.

B. Powers Conferred and Duties Imposed on Trustees Jointly

[453] The Uniform Act section 52 provides that powers and duties are jointly imposed if there is more than one trustee. Section 52 is subject to further provisions on decision-making by multiple trustees. Section 52 also provides for the surviving trustees to act as required. The *Trustee Act* has a similar provision.[108]

[454] The provisions set out in Uniform Act section 52 are sensible, provide clarity and should be included in trustee legislation.

C. Trustees May Act by Majority Rule

[455] The Uniform Act section 53 proposes that trustees may act by majority rule. Under Alberta common law, joint trustees must act with unanimity. If adopted, the change to majority rule would only apply to trusts created after the provision comes into force.

1. BASIS FOR MAJORITY RULE

[456] The ULCC comments on Uniform Act section 53 point out that allowing joint trustees to act by majority unless the trust instrument stipulates otherwise is a significant change in the law. This change reverses the current default rule which holds that unanimity is required if the trust instrument is silent. The concept of trustees acting by majority in the exercise of powers and duties flows through to other actions and decisions related to trust administration. In particular, those nominated in a trust instrument to appoint trustees, designated persons authorized to appoint substitute trustees, and trustees acting to remove a co-trustee would be authorized by the Uniform Act to make decisions by majority.

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[108] *Trustee Act* states:

> **Joint trusteeship**
>
> **29** When a power or trust is given to or vested in 2 or more trustees jointly then, unless the contrary is expressed in the instrument, if any, creating the power or trust, it may be exercised or performed by the survivor or survivors of them for the time being.

[457] The reasons outlined by the ULCC for switching to majority rule are:

- Implementing majority rule brings the rule for trustees of private trusts into alignment with that which applies to public and charitable trusts;
- Updating the law to reflect modern practice since trust instruments often authorize joint trustees to act by majority;
- Majority rule facilitates efficient trust management by reducing the need to go to court for assistance concerning trustee decisions and actions; and
- Most American states and some other commonwealth jurisdictions no longer apply the unanimity rule.[109]

[458] There are many additional reasons to change trustee legislation so that trustees can act by majority. The current unanimity rule gives a veto power to individual trustees and may make it impossible for terms of the trust to be carried out. Although there are situations when the unanimity principle may rightly prevent the majority from oppressing a minority trustee, it is more often the case that unanimity leads to gridlock, which is a serious concern in terms of the appropriate administration and distribution of trust property.

[459] The majority rule is a common sense approach to decision making that works well in a number of situations. In particular, it is usual to put a term in a trust instrument allowing the trustees to act by majority. A specific requirement that trustees act unanimously would be rare as attempts to achieve unanimity are generally futile.

[460] As to whether the majority rule should apply to other decision making processes, it would be an appropriate result, subject to the trust instrument stating otherwise.

2. PROSPECTIVE APPLICATION AND TRANSITION

[461] It is important to note that the majority rule is prospective only. Decision making by majority rule will be the default for trusts created by a trust

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[109] Based on a cursory review, at least two commonwealth jurisdictions retain the unanimity rule. In particular, Saskatchewan did not implement the majority rule in 2009. The New Zealand Law Commission, *Review of the Law of Trusts: A Trusts Act for New Zealand*, Report 130 (2013) also proposes the retention of trustee unanimity.

instrument that is executed after the provision comes into force but not for those established before then. It should not be assumed that the change from unanimity to majority rule is appropriate or automatically applicable to trusts that are already established.

D. Trustee Abstentions

[462] Uniform Act section 54 is an appropriate corollary to the switch to majority decision making proposed in section 53. Section 54 clarifies the status of a trustee who abstains from a decision making process due to a conflict of interest. The abstaining trustee is deemed not to be a trustee for the sole purpose of determining whether a decision is taken by the majority or is unanimous.

[463] Section 54 is particularly helpful in determining whether a decision was made unanimously. While there is nothing in the Uniform Act that requires the unanimous consent of trustees, a trust instrument may require unanimity. Unanimity will also continue to apply as the default rule for existing trusts.

[464] Like section 53, section 54 only applies to a trust created after the section comes into force. For example, if a trust instrument created after the section comes into force provides for seven trustees to act unanimously and one abstains, the decision is unanimous if the other six trustees agree. In contrast, if a trust was created before the section comes into force and one of the trustees abstains, it is unclear whether unanimity requires six or seven trustees to agree.

[465] To provide clarity and reduce disputes, Uniform Act section 54 should apply to all trusts regardless of when they were created. Section 54 takes into account that a trustee should be upfront in recognizing and avoiding conflicts of interest. Section 54 encourages good behaviour by trustees. While an individual trustee effectively holds veto power when unanimity is required, abstention for a conflict of interest should not be equated with a veto or negative vote. For example, a trustee's personal interest may direct that the trustee should vote against a proposal. Allowing for votes to be counted according to section 54 both ensures that a decision can be made and that the trustee can truly abstain. To do otherwise, i.e. to equate the abstention with a negative vote, draws the trustee into the conflict of interest which he or she sought to avoid.

[466] In addition to a conflict of interest, Uniform Act section 54 would also allow a trustee to abstain for "other good reason." The ULCC commentary does not clarify what other good reasons for abstention are. The ALRI Board discussed

this matter at length and could not find appropriate reasons, other than a conflict of interest, that would justify an abstention with the results provided in Uniform Act section 54. Therefore, it is ALRI's view that a trustee should only be allowed to abstain from a decision due to a conflict of interest.

RECOMMENDATION 46

Regardless of when a trust is created, a trustee who abstains from a decision or act due to a conflict of interest only should be deemed to not be holding office as trustee for the purpose of determining whether a decision was made by a majority or unanimously as proposed in Uniform Act section 54.

E. Allocation of Insurance Proceeds

[467] Uniform Act section 55 updates the law concerning insured trust property. As provided in Uniform Act section 2, section 55 prevails over any contrary provisions of a trust instrument. Uniform Act section 55(1) states that the section applies only to insurance proceeds payable after the section comes into force.

[468] Although the *Trustee Act* authorizes a trustee to insure trust property, subject to a 75% cap on its value, there is very little overlap with the substance of the Uniform Act provisions regarding insurance. Uniform Act section 55 makes specific provisions for the allocation of insurance proceeds.

[469] The issue is whether the insurance provisions in Uniform Act section 55 are appropriate for modern Alberta trust practice.

1. AUTHORITY TO INSURE

[470] Uniform Act section 55, although clearly based on the premise that trust property can be insured, does not specifically authorize a trustee to do so. The Uniform Act places no restrictions as to the nature of the insurable loss, value of the insurance policy, or on insuring trust property that a beneficiary may be entitled to immediately claim and thus collapse the trust. The Uniform Act also does not say how the trustee can make the premium payments. The ULCC comments on Uniform Act section 55(5) indicate that this provision reflects and protects legitimate commercial insurance arrangements which often require insurance proceeds to be paid to secured parties, landlords, lessors or lessees, or that proceeds be used to replace, maintain or repair the insured property.

[471] Although Uniform Act section 55 contains a mix of updated provisions, it does not clearly state that the trustee may insure trust property. It makes sense and is a common practice for many trusts that the trustee acquires the insurance. Uniform Act section 55 could be improved by retaining the authority to insure provided in *Trustee Act* section 24. However, the current *Trustee Act* cap on the value of insurance is puzzling and not appropriate in the modern context.[110] Most trust instruments authorize trustees to purchase insurance for 100% of the property value.

RECOMMENDATION 47

The new Act should retain the express authority for a trustee to insure trust property and should allow the trustee to insure the full value of the trust property.

2. METHOD OF ALLOCATION

[472] The ULCC comments on Uniform Act section 55(2) indicate that a trustee must apply insurance proceeds to the trust capital. Uniform Act section 55(2) accurately describes the law and practice as to how insurance proceeds are allocated to trust assets. In the event insurance proceeds paid out exceed the value of capital or property lost or damaged, the excess can be considered income.

[473] Uniform Act section 55(3) changes the current law which holds that if a beneficiary insures trust property, proceeds of the insurance are paid to the beneficiary. Under the Uniform Act, insurance proceeds resulting from insurance purchased by a beneficiary and paid to the beneficiary must then be paid to the trustee, who applies the proceeds to the capital and reimburses the beneficiary for what the trustee considers reasonable expenses incurred to acquire the insurance.

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[110] *Trustee Act* states:

> **Insuring trust property**
>
> **24(1)** A trustee may
>
> (a) insure against loss or damage by fire any building or other insurable property to any amount, including the amount of any insurance already on foot, not exceeding 75% of the full value of the building or property, and
>
> (b) pay the premiums for the insurance out of the income of the property or out of the income of any other property that is subject to the same trusts without obtaining the consent of any person entitled wholly or partly to that income.
>
> **(2)** This section does not apply to any building or property that a trustee is bound forthwith to convey absolutely to a cestui que trust on being requested to do so.

[474] The ULCC does not say why the change in Uniform Act section 55(3) concerning use of proceeds would be advantageous, other than to briefly reiterate that the trustee is to reimburse the out of pocket beneficiary in an amount that "takes account of the interests of the other beneficiaries in the trust property."

[475] Uniform Act section 55(3) makes an important and necessary change to the common law in requiring a beneficiary, for example a life interest holder who purchases insurance on trust property, to turn over the proceeds to the trustee. This requirement would help ensure that the capital value of trust property is protected, with appropriate consideration given to the beneficiary who pays the premiums. It is a common practice in this situation to have both the beneficiary and trustee named on the insurance policy.

F. No Notice from Other Trust

[476] Uniform Act section 56 provides that, in the absence of fraud, a trustee does not have notice of an instrument, fact, matter or thing in relation to a trust simply because the trustee has notice of the instrument, fact, matter, or thing in his or her capacity as the trustee of another trust.

[477] The *Trustee Act* has nothing similar to Uniform Act section 56. The issue is whether trustee legislation should protect a trustee from deemed notice as provided in Uniform Act section 56.

[478] The ULCC comments indicate that Uniform Act section 56 is intended to protect a trustee who administers more than one trust from acquiring notice of a matter concerning one trust merely by virtue of his or her trusteeship of another trust. A situation involving fraud by a trustee would negate the legislative protection. According to the ULCC, what constitutes actual notice to a trustee depends on the circumstances.

[479] It is not necessary to protect a trustee from deemed notice by including a provision such as Uniform Act section 56 in trustee legislation. The common law concerning reasonable notice is well developed and applicable to modern trust practice.

RECOMMENDATION 48

The new Act does not need to protect a trustee who administers more than one trust from potential deemed notice situations as the common law concerning reasonable notice is well developed.

CHAPTER 14

Variation and Termination of Trusts

A. Definition of "Arrangement"

[480] Uniform Act section 57 includes a definition of "arrangement" which applies in respect of Part 5 and refers to:

- A variation, resettlement or termination of a trust, or
- A variation or delegation of, or an addition to, the powers of a trustee in relation to the management or administration of a trust.

The definition of "arrangement" is substantively similar to how the word is used in the *Trustee Act* section 42, although the *Trustee Act* does not define it.

B. Application

1. NATURE OF INTEREST

[481] Uniform Act section 58 provides that the provisions on variation of trusts apply whether the interest in the trust property is vested or contingent. The *Trustee Act* does not have a comparable provision. However, the examples listed in *Trustee Act* section 42(3) encompass contingent interests. *Trustee Act* section 42(5) also allows the court to consent on behalf of a person who has a vested or contingent interest.

[482] Accordingly, it is appropriate for the variation provisions to apply to both vested and contingent interests as provided in Uniform Act section 58.

2. TRUSTS ARISING BY OPERATION OF LAW

[483] Uniform Act section 58 provides that the provisions on variation of trusts apply to trusts that arise by operation of law. Generally speaking, the Uniform Act does not apply to trusts that arise by operation of law, as was discussed in Chapter 3. For reference, the recommendation in Chapter 3 provides:

> Recommendation 9
>
> The new Act should not apply to implied, resulting or constructive trusts or to any other trust that arises by operation of law as proposed in Uniform Act section 2(3).

[484] Similarly, the variation provisions in *Trustee Act* section 42 also apply to trusts that arise by construction or implication. However, under the *Trustee Act* this result is achieved by the fact that the Act as a whole applies to trusts arising by construction or implication, rather than by specific application of the variation provisions.[111]

[485] The meaning of Uniform Act section 58 must be interpreted in light of the wording of Uniform Act section 2(3). As discussed in Chapter 3, section 2(3) of the Uniform Act provides:

> **Application of Act**
>
> **2(3)** This Act, except Part 9 [Perpetuities and Accumulations], does not apply in respect of the following trusts:
>
> (a) an implied trust;
>
> (b) a resulting trust;
>
> (c) a constructive trust;
>
> (d) any other trust that arises by operation of law other than an enactment.

[486] ALRI has recommended that trustee legislation should not apply to trusts arising by operation of law, including implied trusts, resulting trusts, and constructive trusts.

[487] It order to make it clear which trusts are covered by Part 5, ALRI recommends specifying which trusts are subject to the variation provisions, rather than setting out which trusts are not. For example, Uniform Act section 58 could be revised to apply to trusts "arising by a trust instrument" instead of generally applying to trusts and then excluding implied, resulting and constructive trusts and those that arise by operation of law.

3. TRUSTS ARISING BY ENACTMENT

[488] Uniform Act section 58 refers to trusts that arise by operation of law but does not clarify whether the variation provisions apply to trusts arising by enactment. As discussed in Chapter 3, the wording of Uniform Act section 2(3) is

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[111] *Trustee Act* states:

> **Definitions**
>
> **1** In this Act, "trustee" includes:
>
> (b) a trustee whose trust arises by construction or implication of law as well as an express trustee.

far from ideal: "This Act, except Part 9 [Perpetuities and Accumulations], does not apply in respect of … any other trust that arises by operation of law other than an enactment." It could therefore be argued that the variation provisions would apply to trusts arising by enactment by virtue of Uniform Act section 2(3) and, hence, they need not be expressly mentioned in Uniform Act section 58.

[489] However, as was discussed in Chapter 3, extending the application of trustee legislation to trusts arising under other enactments risks catching many readers off guard. A person who ends up being a trustee under the *Estate Administration Act* may not know to consult trustee legislation as well. Accordingly, it is recommended that the application of trustee legislation should be clarified in those acts which give rise to a trust. For reference, the recommendation in Chapter 3 states:

> RECOMMENDATION 10
>
> The new Act should not apply to trusts that arise by enactment unless expressly incorporated into other enactments.

[490] Accordingly, taking into account the comments in the previous section and those made here, the Uniform Act should be revised to more clearly state which trusts the variation provisions do and do not apply to.

RECOMMENDATION 49

The new Act should provide that the variation provisions apply to trusts that arise by trust instrument other than an enactment.

4. TEMPORAL APPLICATION

[491] *Trustee Act* section 42(2) provides that the variation provisions apply regardless of when the trust was created. Uniform Act section 2(1) is to the same effect.

C. Arrangement Effective on Unanimous Consent

[492] Uniform Act section 59 allows for arrangements without court approval if all the beneficiaries are of full capacity and all consent. Section 59 prevails over contrary provisions in a trust instrument.

[493] The *Trustee Act* section 42 sets out detailed provisions for arrangements.[112] Beneficiaries with capacity must give written consent under section 42(6). Under

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[112] *Trustee Act* states:

> **Variation of trusts**
>
> **42(1)** In this section, "beneficiary", "beneficiaries", "person" or "persons" includes charitable purposes and charitable institutions.
>
> **(2)** Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench.
>
> **(3)** Without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to
>
> (a) any interest under a trust where the transfer or payment of the capital or of the income, including rents and profits
>
> (i) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages,
>
> (ii) is postponed to the occurrence of a stated date or time or the passage of a stated period of time,
>
> (iii) is to be made by instalments, or
>
> (iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,
>
> and
>
> (b) any variation or termination of the trust or trusts
>
> (i) by merger, however occurring,
>
> (ii) by consent of all the beneficiaries,
>
> (iii) by any beneficiary's renunciation of the beneficiary's interest so as to cause an acceleration of remainder or reversionary interests.
>
> **(4)** The approval of the Court under subsection (2) of a proposed arrangement shall be by means of an order approving
>
> (a) the variation or revocation of the whole or any part of the trust or trusts,
>
> (b) the resettling of any interest under a trust, or
>
> (c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.
>
> **(5)** In approving any proposed arrangement, the Court may consent to the arrangement on behalf of
>
> (a) any person who has, directly or indirectly, an interest, whether vested or contingent, under the trust and who by reason of minority or other incapacity is incapable of consenting,
>
> (b) any person, whether ascertained or not, who may become entitled directly or indirectly to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons,
>
> (c) any person who after reasonable inquiry cannot be located, or
>
> (d) any person in respect of any interest of the person's that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.
>
> **(6)** Before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting to it.
>
> **(7)** The Court shall not approve an arrangement unless it is satisfied that the carrying out of it appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (5), and that in all the circumstances at the time of the application to the Court the arrangement appears otherwise to be of a justifiable character.
>
> **(8)** When an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself or herself unless the instrument shows an intention that he or she may so appoint.
>
> **(9)** When a will or other testamentary instrument contains no trust, but the Court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of a minor or other incapacitated beneficiary that the Court approve an arrangement whereby the property or interest

Continued

section 42(5), the court may consent on behalf of beneficiaries who do not have capacity to consent. However, section 42(2) additionally requires court approval for any arrangement.

[494] The issue is whether trustee legislation should be changed to authorize arrangements by consent only, rather than requiring court approval.

[495] The ULCC comments indicate that Part 5 introduces a major change to the common law; competent beneficiaries may not only terminate but also vary a trust by unanimous consent.

[496] Uniform Act section 59 was drafted to replace the rule in *Saunders v Vautier* which allows beneficiaries to terminate a trust in certain circumstances. However, Alberta replaced that rule some 40 years ago. As was stated in the explanatory note in the bill introducing what is now *Trustee Act* section 42:[113]

> **The Trustee Act**
>
> **12 (2)** This amendment will implement the recommendations of the Institute of Law Research and Reform and their Report No. 9 (The Rule in *Saunders* v. *Vautier*). The Rule is as follows:
>
>> Where there is an absolute vested gift made payable at a future event, with a direction to accumulate the income in the meantime and pay it with the principal, the court will not enforce the trust for accumulation, in which no person has any interest but the legatee.
>
> This amendment will replace the rule to the extent of ***giving the court power to decide whether to permit termination or variation of the trust*** so that cognizance may be taken of the donor's intent, ignored in the application of the rule, and also of the interest of the donee.

Section 42 was intended to limit beneficiaries' ability to terminate a trust by requiring court approval. As noted in ALRI's report on *Saunders v Vautier*:[114]

> We think that the rule should be changed. The theoretical consequence of absolute ownership should not operate automatically to defeat the testator's intention. The law allows him to make the gift, and there should be no rule of "legal theology" to prevent him from

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taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the Court has jurisdiction under this section to approve that arrangement.

[113] Bill 15, *The Attorney General Statutes Amendment Act, 1973*, 2nd Sess, 17th Leg, Alberta, 1973, cl 12(2) [emphasis added] (enacted as SA 1973, c 13).

[114] Institute of Law Research and Reform, *The Rule in Saunders v. Vautier*, Final Report 9 (1972) at 5, online: <www.alri.ualberta.ca/docs/fr009.pdf>.

> imposing restrictions upon enjoyment even when the ownership is vested and indefeasible.

[497] Uniform Act section 59 would reverse the change reflected in *Trustee Act* section 42 and would again allow beneficiaries to terminate a trust solely by consent, without any consideration of the settlor's intent. Uniform Act section 59 would also expand beneficiaries' ability to vary a trust by consent.

[498] While the Uniform Act would still require court approval for beneficiaries who are not able to consent, providing substitute consent is not the sole reason for court oversight. Court oversight can be critical in the case of a beneficiary-requested variation. For example, court oversight can avoid tax and other issues that may arise and which beneficiaries may not have considered. Court oversight also allows the court to balance the beneficiaries' request for an arrangement against other factors, such as the settlor's intent and the circumstances surrounding the beneficiaries' request.

[499] It is appropriate to continue the requirement for court oversight for any arrangement. Changing trustee legislation to eliminate court oversight would reverse a sound policy decision that resulted in legislation that works reasonably well. Such a change would also disrupt the operation of many trusts and have a negative impact on Alberta's established framework for prudent estate, tax and trust planning.

RECOMMENDATION 50

The new Act should not authorize arrangements by beneficiary consent alone.

RECOMMENDATION 51

The new Act should retain the requirement of court approval for all arrangements.

D. Arrangement Effective with Court Approval

[500] As noted above, under proposed trustee legislation the court must approve all arrangements, even if all the beneficiaries have capacity and consent to the arrangement.

1. FACTORS THE COURT MUST CONSIDER

[501] *Trustee Act* section 42(7) provides that a court must consider whether the arrangement is of a justifiable character in all the circumstances at the time of the application. The Uniform Act has no comparable requirement.

[502] There are advantages to the current requirements under the *Trustee Act* that direct the court to consider not only whether an arrangement would benefit a particular beneficiary, but also the circumstances at the time and general justification for varying the trust as part of the application for approval of an arrangement.

[503] While *Trustee Act* section 42 has worked relatively well, the general test of justifiable character may not provide the clearest guidance to those who would seek to vary a trust. In particular, section 42 may not draw sufficient attention to the settlor's intent. When considering whether to approve a proposed arrangement it is important for a court to consider the settlor's intent when creating the trust. While ALRI recognizes there are situations in which a settlor's intent will no longer be practical or reasonable, settlor's intent remains an important consideration for courts when approving or rejecting an arrangement.

[504] Nor does section 42 offer a means to distinguish between interests that are likely to vest and those that are too remote.[115] In considering an arrangement, a court may be faced with numerous beneficiaries, as well as possible beneficiaries whose interests are so remote that they are highly unlikely or almost impossible. It is appropriate for a court to consider the interests at stake and to take into account the remoteness of affected interests.

[505] Accordingly, it may be an appropriate time to clarify the test of justifiable character and to look at a model beyond what appears in the *Trustee Act* and the Uniform Act.

[506] The New Zealand Law Commission considered factors for court approval of arrangements in its 2013 report.[116] The New Zealand Commission, like the ULCC, proposed a unanimous consent provision if all beneficiaries were competent adults. However, as noted above, allowing adult beneficiaries to vary

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[115] For example in *Knocker v Youle* (1985), [1986] 2 All ER 914 (ChD), it was suggested the court need only address two levels of contingency under the English *Variation of Trusts Act 1958*.

[116] New Zealand Law Commission, *Review of the Law of Trusts: A Trusts Act for New Zealand*, Report 130 (2013). This Report has been received by the New Zealand Parliament and is under consideration.

a trust without court oversight risks ignoring both the settlor's intent as well as critical implications, such as tax consequences.

[507] The New Zealand model provides that the court must take into account the following factors:

- The nature of any person's interest and the effect any proposed varying arrangement may have on that interest;
- The benefit or detriment to any person that may result from the court approving any proposed varying arrangement;
- The benefit or detriment to any person that may result from the court declining to approve any proposed varying arrangement;
- The intentions of the settlor to the extent these can be ascertained.

Within the New Zealand model, these factors are applied when the court needs to approve an arrangement on behalf of a beneficiary who cannot consent (due to capacity or impracticality) or where there is an adult beneficiary who refuses consent. In the model ALRI is proposing, these factors would apply to all arrangements including those with competent, consenting adult beneficiaries.

[508] The New Zealand model does not require the court to take into account tax or other statutory implications of the proposed variation. This was a key factor in the decision to retain court oversight of arrangements and could easily be added.

RECOMMENDATION 52

The new Act should provide that the court must consider the following factors in deciding whether to approve an arrangement:

- The nature of all interests and the effect any proposed varying arrangement may have on those interests;
- The benefit or detriment to any person that may result from the court approving, or declining to approve, any proposed varying arrangement;
- The intentions of the settlor to the extent these can be ascertained; and
- The impact of tax and other statutory provisions.

2. BENEFICIARIES CAPABLE OF CONSENTING

[509] While ALRI does not recommend adopting the Uniform Act proposal that would allow for arrangement on the consent of competent adult beneficiaries alone, consent is still an important element to consider in the context of any arrangement. Or rather, lack of consent is a critical element to consider.

[510] Uniform Act section 60(5) gives the court authority, on application by a trustee or beneficiary, to approve an arrangement on behalf of a competent beneficiary who does not consent to a proposed arrangement. This is a change from the current Alberta requirement in *Trustee Act* section 42(6) that all competent beneficiaries must consent in writing.

[511] Uniform Act section 60(6) expands the court's role in trust relationships and establishes three different and specific criteria that the court is to consider when approving on behalf of a beneficiary. In particular, Uniform Act section 60(6) provides that a court will not approve an arrangement unless the court is satisfied that:

- The arrangement will not be detrimental to the pecuniary interest of the person refusing consent;
- A substantial majority of the beneficiaries, representing a substantial majority of the beneficial interests in the trust property as determined by the monetary value of those interests, have
  - consented to the arrangement, or
  - had the court approve the arrangement on their behalf under section 60(3); and
- Not approving the arrangement will be detrimental to the administration of the trust and the interests of other beneficiaries.

[512] The ULCC comments concerning Uniform Act section 60(5) acknowledge that authorizing the court to approve an arrangement on behalf of a non-consenting competent beneficiary is a "departure" from the common law. According to the ULCC, the criteria in Uniform Act section 60(6) "will not be easily met" and the provisions will likely be used in situations where beneficial interests are widely dispersed and a few beneficiaries hold out against a change.

[513] The New Zealand model also allows for a court to approve an arrangement where a competent beneficiary declines to consent. In deciding

whether to approve on behalf of that beneficiary, the court must consider the same factors that apply to any arrangement:

- The nature of any person's interest and the effect any proposed varying arrangement may have on that interest;
- The benefit or detriment to any person that may result from the court approving any proposed varying arrangement;
- The benefit or detriment to any person that may result from the court declining to approve any proposed varying arrangement; and
- The intentions of the settlor to the extent these can be ascertained.

Though the list is different than that listed in Uniform Act section 60, the effect will be the same.

[514] The New Zealand model also has a further feature that operates to protect certain vested interests. Under the New Zealand model, the court must not approve an arrangement if its effect would be to reduce or remove any fixed indefeasible interest or interest that has vested absolutely in a beneficiary. The protection for indefeasible and vested interests seems sensible and appropriate to adopt. This additional feature also sets a brake on the court's ability to "override" the beneficiaries' interests when the court is asked to approve on their behalf. Having a specific provision to this effect in trustee legislation would also alert other beneficiaries that there are limits to the effect of an arrangement.

RECOMMENDATION 53

The new Act should allow a court to approve an arrangement on behalf of a person who refuses consent.

RECOMMENDATION 54

The new Act should provide that the court must not approve an arrangement on behalf of a person if the effect of the arrangement would be to reduce or remove any fixed indefeasible interest or interest that has vested absolutely in a beneficiary.

3. BENEFICIARIES UNABLE TO CONSENT

[515] Uniform Act section 60(3) allows the court to approve an arrangement on behalf of:

- A person who is not capable of consenting because the person is a minor or is otherwise not of full capacity;
- A person whose existence or whereabouts cannot be established despite reasonable measures having been taken to discover that information;
- A person in respect of an interest of the person that may arise by reason of the person being in a class of persons that may benefit from a power of appointment that may or must be exercised by the trustees or any other donee of the power; or
- An unborn person.

[516] *Trustee Act* section 42(5) similarly provides that the court may consent on behalf of:

- Any person who, by reason of minority or other incapacity, is incapable of consenting;
- Any person who, after reasonable inquiry, cannot be located.
- Any person who may become entitled to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons; or
- Any person in respect of any interest of the person's that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.

The *Trustee Act* used to refer to an unborn person but this term was removed when the reference to missing person was updated.[117] Under the *Trustee Act*, an unborn person would likely be covered as someone who may be entitled to an interest on the happening of a future event. However, to avoid doubt it is appropriate to refer expressly to future persons as a category of persons on whose behalf the court may approve an arrangement.

[517] Inevitably, some of the classes of beneficiary listed above will be remote. The list of factors gleaned from the New Zealand model will allow the court to

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[117] *Public Trustee Act*, s 52.

consider all interests and the effect of approving or not approving the proposed arrangement. In contrast, the Uniform Act requirement that an arrangement can only be approved if it is to the benefit of certain beneficiaries may limit the court's discretion.

RECOMMENDATION 55

The new Act should allow a court to approve an arrangement on behalf of a person who is unable to consent by reason of minority, incapacity or other circumstances.

[518] As with a beneficiary who is capable but refuses or declines to consent, Recommendation 54 would also apply where the court approves an arrangement for someone who is unable to consent.

4. CHARITABLE ORGANIZATIONS, CHARITABLE PURPOSE TRUSTS AND NON-CHARITABLE PURPOSE TRUSTS

[519] Uniform Act section 60(7) allows the court to approve an arrangement on behalf of a charitable organization that cannot consent in its own right, as well as for charitable purpose trusts. This result is consistent with *Trustee Act* section 42(1) which includes both charitable institutions and charitable trusts in the definition of beneficiary.

[520] Uniform Act section 60(7) also allows the court to approve an arrangement on behalf of a non-charitable purpose trust described in section 74(3). The concept of non-charitable purpose trusts is not covered by the *Trustee Act*. As discussed in Chapter 16, non-charitable purpose trusts are a concept that should be adopted in Alberta. Accordingly, the court should be able to approve an arrangement on behalf of a non-charitable purpose trust. This result in consistent with the court consenting to arrangements on behalf of a charitable purpose trust or a charitable organization that lacks capacity to consent.

5. POWER OF APPOINTMENT

[521] The Uniform Act does not include the prohibition found in *Trustee Act* section 42(8) that the donee of a power of appointment exercisable by deed may not appoint to themself unless authorized to do so by the instrument.

[522] The issue is whether trustee legislation should continue to state that the court cannot permit a donee to exercise a power of appointment to their own benefit if the governing instrument does not expressly authorize them to do so.

[523] The limitation on a donee's power of appointment described in *Trustee Act* section 42(8) is an important provision and should continue in trustee legislation. In the event a settlor or testator wants to allow a trustee to exercise a power of appointment by distributing trust property to themself, a provision could be added to the trust instrument to say so. The statutory limitation and the practice of drafting to allow a trustee to appoint to themself is well understood.

RECOMMENDATION 56

Unless the trust instrument provides otherwise, trustee legislation should continue to provide that the court may not permit a donee to exercise a power of appointment to their own benefit as provided in *Trustee Act* section 42(8).

6. PRIORITY TO TRUSTEE LEGISLATION

[524] Uniform Act section 60 prevails over contrary terms that may be expressed in a trust instrument. This is a change from the policy reflected in *Trustee Act* section 42(2).

[525] *Trustee Act* section 42 recognizes that the trust instrument may reserve the power of variation to a specific person or persons. However, section 42 otherwise seems to imply that the settlor can exclude the court's ability to vary a trust in the trust instrument.

[526] It seems appropriate that the court should be able to vary any trust, given the safeguards proposed above: beneficiary consent or court approval on a beneficiary's behalf, the listed factors a court must consider, and protection afforded to vested and indefeasible interests. If the settlor has reserved a power to vary to another person or persons this would be relevant to whether the arrangement is justifiable. Even though the settlor has provided that a specific person may approve an arrangement, that person may have lost capacity or may be unreasonable in refusing approval. It is appropriate to have recourse to a court approval process.

RECOMMENDATION 57

The new Act should provide that court authority to vary a trust, in accordance with this Act, prevails over contrary provisions in a trust instrument.

7. WHEN AN ARRANGEMENT TAKES EFFECT

[527] Uniform Act section 60(2) includes a scheme that determines when an arrangement takes effect. The scheme reflects whether consent is given by beneficiaries with capacity and whether the court approves an arrangement on a beneficiary's behalf.

[528] Given the recommendation that all arrangements should continue to require court approval, a specific provision dealing with when an arrangement takes effect is not required. If there is any doubt, the date that the arrangement takes effect can be addressed in the court order approving it.

E. Notice to Public Trustee and Attorney General

[529] Uniform Act section 61 describes a role for the Public Trustee and Attorney General in the matter of court approval of arrangements. The role of the Public Trustee and Attorney General in trust legislation is discussed in detail in Chapter 2. There, ALRI recommends the provisions regarding the appropriate government office, including section 61, be included in trustee legislation.

F. *Trustee Act* section 42(9)

[530] *Trustee Act* section 42(9) provides that when a will or other testamentary instrument contains no trust, but a court is satisfied that it would be for the benefit of a minor or other incapacitated beneficiary that the court approve an arrangement where the property or interest taken by that beneficiary is held on trust during the period of incapacity, the court may approve such an arrangement.[118]

[531] This particular provision is applicable only in the context of estate administration. Although a sensible and important provision, it is more appropriately located in the *Estate Administration Act*. This provision should be included in the *Estate Administration Act* through a consequential amendment.

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[118] *Trustee Act* states:

> **Variation of trusts**
>
> **42(9)** When a will or other testamentary instrument contains no trust, but the Court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of a minor or other incapacitated beneficiary that the Court approve an arrangement whereby the property or interest taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the Court has jurisdiction under this section to approve that arrangement.

CHAPTER 15
Trustee Compensation and Accounts

A. Application

1. APPLICATION TO SPECIFIC TRUSTEES

[532] Sections 62 and 63 of the Uniform Act specifically contemplate that compensation and accounting sections of trustee legislation would apply to personal representatives and others in a trustee-like role.

[533] Uniform Act section 62 defines "trust" as including the estate of a deceased person, and "trustee" as including a personal representative and others in a trustee-like role. Uniform Act section 63 provides that the trustee compensation and accounts provisions of the Act apply in respect of estates of persons who die before, on or after the date the Part comes into force.

[534] The main issue is whether the Uniform Act compensation sections are comparable to those that currently apply to personal representatives and whether compensation and other provisions should also apply to others included in Uniform Act section 62 as "trustees" who are in trustee-like roles.

a. Personal representatives

[535] The application of the Uniform Act to personal representatives was discussed in Chapter 3. For reference, the recommendation stated:

> Recommendation 11
>
> The new Act should apply to personal representatives in their capacity as trustees ; however, the New Act should not apply to personal representatives when they are acting in their capacity as personal representatives except as provided in estate administration legislation.

[536] Personal representatives are currently entitled to compensation under the *Surrogate Rules.* Current Alberta law is similar, but less clear, than the provisions in the Uniform Act.

[537] The *Surrogate Rules* provide that a personal representative is entitled to compensation based on several factors such as:

- The value of the estate;

- The complexity of the work involved and whether any problematic or unusual questions arose;
- Time spent;
- The number and complexity of tasks delegated to others; and
- The number of personal representatives.

Further a personal representative may be entitled to additional compensation when called upon to perform additional roles such as managing a business or if the personal representative encounters uncommon problems or must instruct litigation.[119]

[538] Under the *Surrogate Rules*, if a will fixes the compensation payable to a personal representative then no greater amount can be paid unless all beneficiaries agree or the court orders a different amount. Further, once determined, compensation must be shared among all personal representatives in the amounts agreed to by the personal representatives or as ordered by the court.[120]

[539] The compensation provisions in the Uniform Act are a fairer scheme and reflect the reality that a trust may continue for some time. The Uniform Act also provides flexibility where the testator has not provided adequate compensation for the trustee's efforts.

[540] In keeping with Recommendation 11 extending the trustee compensation provisions to personal representative should be done by amendments to the *Estate Administration Act*. Uniform Act section 62 and 63 are retained in the sample draft legislation pending such amendment

b. Committee of a patient

[541] Besides personal representatives, Uniform Act section 62 includes "a committee of a patient appointed under statute..." as a trustee for purposes of compensation and accounts. This provision is "bracketed" and may not be necessary in all jurisdictions.

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[119] *Surrogate Rules*, Schedule 1, Part 1 – Personal Representatives' Compensation, ss 2-3.

[120] *Surrogate Rules*, Schedule 1, Part 1 – Personal Representatives' Compensation, ss 4-5.

[542] This provision is not necessary in Alberta given the mental health legislation scheme concerning guardians. In particular, the *Mental Health Act* section 1(f) describes "guardian" as:[121]

- A parent or guardian of a minor;
- The director under *Child, Youth and Family Enhancement Act* provisions providing for temporary or permanent guardianship orders for a child;[122] or
- A guardian having authority under the *Adult Guardianship and Trusteeship Act*, with authority over the matters referred to in section 33(2)(a) and (g) of that Act.

[543] The *Adult Guardianship and Trusteeship Act* includes sections concerning duties, responsibilities and compensation of any trustee appointed under the Act. Specifically, section 66 of the *Adult Guardianship and Trusteeship Act* provides that a trustee is entitled to compensation out of the represented adult's property.[123] The trustee can elect to be compensated according to a fee schedule set out in the *Adult Guardianship and Trusteeship Regulation*[124], or a court can order an appropriate amount for compensation.

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[121] *Mental Health Act*, RSA 2000 c M-13.

[122] *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12.

[123] *Adult Guardianship and Trusteeship Act* states:

> **Payment to trustee**
>
> **66(1)** A trustee, other than the Public Trustee, is entitled to be compensated out of the property of the represented adult in accordance with this section.
>
> **(2)** A trustee may, in accordance with the regulations, elect to be compensated in accordance with the fee schedule prescribed by the regulations.
>
> **(3)** Where a trustee has made an election under subsection (2),
>
> (a) the trustee is not entitled to take the compensation under the prescribed schedule until authorized to do so by the Court, and
>
> (b) the Court may reduce or eliminate the compensation to which the trustee would otherwise be entitled under the prescribed schedule if the Court is satisfied the trustee has not adequately discharged the trustee's duties.
>
> **(4)** If a trustee has not made an election under subsection (2), the Court may determine the trustee's compensation, having regard to the trustee's effort, care and responsibility and the time expended on behalf of the represented adult.
>
> **(5)** A trustee's compensation may be determined and authority to take compensation may be given on an interim or final application for examination and approval of the trustee's accounts or as otherwise permitted by the Court.
>
> **(6)** The Public Trustee shall be compensated for acting as trustee as determined in accordance with the *Public Trustee Act*.
>
> **(7)** A trustee is entitled to be reimbursed for the direct expenses incurred and disbursements made on behalf of the represented adult.

[124] *Adult Guardianship and Trustee Regulation*, AR 219/2009.

[544] Accordingly, given Alberta's regulatory scheme for minor children and represented adults, it is not necessary to include Uniform Act section 62(b) in Alberta trustee legislation.

c. Testamentary guardian

[545] The Uniform Act section 62(c) also refers to a "testamentary guardian." In Alberta, this would mean the guardian of a minor will beneficiary. It is unclear which statute, if any, entitles such guardians to compensation. However, since the Office of the Public Trustee may serve as the ultimate trustee for minor children under the *Public Trustee Act*, provisions which govern the Public Trustee would serve as a point of reference for a guardian seeking compensation for services on behalf of a minor will beneficiary.[125]

[546] *Public Trustee Act* section 21(1) provides that the Public Trustee may be designated in a trust instrument to oversee administration of a trust on behalf of a minor child.[126] If this occurs, the Public Trustee is required to perform tasks and is entitled to compensation in accordance with section 6 of the *Public Trustee General Regulation*.[127]

[547] Neither Uniform Act section 62(c) nor the compensation and other provisions in Part 6 are appropriate in the context of Alberta guardians of minor will beneficiaries.

2. TEMPORAL APPLICATION

[548] Uniform Act section 63 provides that the compensation and accounting provisions would apply to all personal representatives. In particular, if a person dies before new trustee legislation comes into force, the deceased's personal representative would be able to claim compensation based on the new legislation and would also be subject to its accounting provisions.

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[125] *Public Trustee Act*, s 21.

[126] *Public Trustee Act* states:

> **Monitoring trustee for minors**
>
> **21(1)** A trust instrument may expressly appoint the Public Trustee to monitor the trustee on behalf of minor beneficiaries, including minor beneficiaries who have a contingent interest in the trust property.

[127] *Public Trustee General Regulation*, Alta Reg 241/2004.

B. Compensation of Trustee

[549] *Trustee Act* section 44 provides that a trustee is entitled to fair and reasonable compensation as permitted by the court, unless the allowance is fixed by the instrument creating the trust.[128] Section 45 provides that a trustee who is a lawyer is entitled to profit costs for any professional work done in connection with the trust.[129] The comparable provisions concerning trustee entitlement to compensation are found in Uniform Act section 64.

[550] Uniform Act section 64 prevails over any contrary provisions in a trust instrument. Section 64(1) provides that a trustee is entitled to fair and reasonable compensation and section 64(4) allows a trustee to apply to the court for a determination on the amount of compensation the trustee is entitled to. Uniform Act sections 64(1) and 64(4), when read together, are similar to *Trustee Act* section 44(1).

[551] Uniform Act section 64(2) expands the group of trustees entitled to reasonable fees for specialized services beyond lawyers to include any trustees with professional skills. Uniform Act section 64(3) states that trustees are not presumed to be entitled to equal compensation; there is nothing equivalent in the *Trustee Act*. The ULCC comments indicate that Uniform Act section 64(3) is included to rebut the presumption that, in situations involving multiple trustees, all are entitled to equal compensation.

[552] Uniform Act section 64(5) sets out factors the court may consider in determining trustee compensation.

[553] Uniform Act section 64(6) provides for a trustee to apply to the court for determination of appropriate compensation, regardless of what the trust

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[128] *Trustee Act* states:

> **Allowances**
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> **44(1)** A trustee under a trust, however created, is entitled to any fair and reasonable allowance for the trustee's care, pains and trouble and the trustee's time expended in and about the trust estate that may be allowed by the Court of Queen's Bench or by any clerk of those courts to whom the matter is referred.
>
> **(2)** A judge of the Court of Queen's Bench may on application to the judge for the purpose settle the amount of the compensation although the trust estate is not before the Court in any action.
>
> **(3)** Compensation may be allowed in the case of any trust created before as well as after the commencement of this Act.
>
> **(4)** Nothing in this section applies to any case in which the allowance is fixed by the instrument creating the trust.

[129] *Trustee Act* states :

> **Professional Fees**
>
> **45** In addition to any allowance, a trustee who is a barrister and solicitor is also entitled to profit costs for any professional work done in connection with the trust.

instrument says. Including Uniform Act section 64(6) in trustee legislation would reverse Alberta law which currently states that trustee compensation terms in a trust instrument override the legislation. The ULCC states that Uniform Act section 64(6) is necessary to provide court relief in the event the trust instrument sets compensation at a level that is too low.

[554] The override rule in Uniform Act section 64(6) reflects a useful and sensible change, particularly in situations where a testator or settlor unilaterally names a trustee and includes a compensation term in the trust instrument. In some cases, the compensation is unreasonably low from the outset. In others, the compensation proves to be unrealistic when the trust takes effect or as the trust continues over time.

[555] Uniform Act sections 64(4) and (6) authorize a trustee to seek court determination of fair and reasonable compensation. However, in ALRI's view, Uniform Act sections 64(4) and (6) should be modified so that a beneficiary may also apply to the court for a decision concerning fair and reasonable trustee compensation.

[556] Uniform Act section 64(7) provides that a court cannot vary the amount of compensation owing to a trustee if the amount is set out in a *contract* between the settlor and trustee, regardless of whether the contract is incorporated by reference in the trust instrument. According to the ULCC comments, Uniform Act section 64(7) provides that a trustee's right to apply to the court for a change in the amount of compensation provided for in a trust instrument, pursuant to Uniform Act section 64(6), cannot be used to allow the trustee to apply to the court to vary compensation terms established in a contract between a settlor and the trustee. This outcome does not seem consistent with the overall rationale for bringing a compensation matter before the court.

[557] Uniform Act section 64(7) attempts to clarify situations involving a corporate trustee where compensation is set according to what is agreed as a term of a contract. In general, section 64(7) should be modified to reflect the concept that terms of contracts and agreements, regardless of who makes them, can be scrutinized by the court and the court has discretion as to whether compensation terms should be enforced or varied. Uniform Act section 64(5) should also be modified to add "terms of a contract" to the list of factors that the court considers when determining fair and reasonable compensation.

[558] Further, Uniform Act section 64(7) should be modified to resolve a problem that comes up when a trust established by will names a corporate

trustee. In particular, case law holds that where a will names a corporate executor or trustee, the compensation agreement between the testator and the trust company must be incorporated by reference in the trust instrument or deed in order to be enforced. The incorporation requirement is impractical and difficult to satisfy. Trust companies are concerned that the compensation terms in a testator's contract for estate administration or trustee services will be not be binding on the estate.

[559] By way of example, Uniform Act section 64(7) should be modified to address the following situation: A testator makes and signs a valid will on day 1, naming Trust Co as executor and trustee of her estate. On day 8, she signs the compensation agreement with Trust Co, which includes specific compensation terms. On day 400, the testator and Trust Co conclude negotiations and sign a new compensation agreement.

[560] Trust companies want certainty that (a) if the testator were to die on day 100, her estate would be bound to honour the compensation terms in the first agreement; and (b) if she dies on day 500, the estate is responsible to pay the Trust Co pursuant to the terms of the second agreement.

[561] Although *Trustee Act* sections 44 - 45 and Uniform Act section 64 reflect the same basic principle that a trustee is entitled to fair and reasonable compensation, Uniform Act section 64 changes and clarifies key aspects of trustee compensation. Trustee legislation should clarify who may apply to the court for an order in respect of compensation and applications respecting compensation should be allowed notwithstanding provisions in the trust instrument that presume to set compensation.

[562] A survey of Alberta cases involving the *Trustee Act* decided between January 2003 and July 201[illegible] revealed that approximately one-third of cases referenced *Trustee Act* section 44. Trustee compensation is often a contentious matter and the updated provisions in the Uniform Act, with modifications as noted above, will help align trustee legislation with modern Alberta trust practice.

RECOMMENDATION 58

The new Act should include trustee compensation provisions that prevail over contrary provisions in a trust instrument.

RECOMMENDATION 59

The new Act should clarify how applications concerning compensation may be brought before a court as proposed by Uniform Act section 64 with the following additions:

- A beneficiary should be able to apply to the court for a *decision concerning* fair and reasonable trustee compensation; and
- The court should be able to consider the "terms of a contract" outlining compensation.

RECOMMENDATION 60

The new Act should not exclude court review of any contract for trustee compensation.

C. Interim Compensation of Trustees

[563] Uniform Act section 65 describes how a trustee may be compensated during the administration of a trust without seeking court approval prior to the payment. There is no equivalent in the *Trustee Act*.

[564] Uniform Act section 65(1) allows a trustee to take reasonable interim compensation for trust services from trust property without court approval if there is at least one fully competent beneficiary. Uniform Act section 65(2) requires the trustee taking interim compensation to notify qualified beneficiaries as to the amount of compensation, reason for payment and the time period (at least 60 days) within which a beneficiary who objects to the compensation must file an application with the court.[130]

[565] Pursuant to Uniform Act section 65(3), if a qualified beneficiary who objects to the interim compensation does not make the court application within the stated period, the court has no authority to hear it. Uniform Act section 65(4) states that once a trustee is given notice of a beneficiary's objection to the interim compensation, the trustee must not take any additional payments until after the court application is decided.

[566] The issue is whether trustee legislation should authorize a trustee to take interim compensation without court approval. The ULCC comments indicate

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[130] Qualified beneficiaries are defined in Uniform Act section 1 as those with a vested property interest or who have given notice to the trustee under Uniform Act section 101.

that the interim compensation provisions are included in the Uniform Act in order to "regularize" the practice and set a procedure that does not involve court approval. Pursuant to Uniform Act section 2(4), section 65 can be overridden by contrary terms expressed in a trust instrument and a settlor can instruct that a trustee not be able to take interim compensation.

[567] It is standard practice to include terms authorizing a trustee to take interim compensation in wills and other trust instruments; thus, the practice should be established as the default condition in trustee legislation. However, a trustee, as well as a qualified beneficiary, should be allowed to bring a court application if a trustee objects to the interim compensation that another trustee has taken.

RECOMMENDATION 61

The new Act should allow a trustee to take interim compensation without court approval as proposed in Uniform Act section 65.

D. Reimbursement of Expenses

[568] Uniform Act section 66 provides for a trustee to be reimbursed for expenses incurred during the administration of the trust. The reimbursement is allowed during administration of the trust and without court approval

E. Passing of Accounts

[569] *Trustee Act* section 14(2) provides that when a trustee wishes to be discharged as trustee he or she may apply to the court for an order passing the accounts of the trust, discharging the trustee and appointing a new trustee in the former trustee's place.[131] Similarly, *Trustee Act* section 15(2) provides that if there are more than two trustees and one applies to be discharged without a substitute

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[131] *Trustee Act* states:

> **Substitute trustee**
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> **14(2)** When a trustee after having commenced to act and before having fully discharged and performed the trusts and powers reposed in the trustee desires to be discharged from the trusts and powers reposed in the trustee,
>
> (a) the trustee may make application to the Court of Queen's Bench for an order passing the accounts of the trust to the date of the application and discharging the trustee from the trust and appointing a new trustee in the trustee's place

trustee being appointed, the court may discharge the trustee and require a "passing of accounts."[132]

[570] Uniform Act section 67 describes a process that a qualified beneficiary or trustee may use anytime to get a court order requiring a trustee to pass accounts on a single occasion or at intervals.

[571] The two processes for passing accounts under the *Trustee Act* both relate to an application by a trustee to be discharged from the trust relationship. The Uniform Act section 67 procedure for applying for the passing of accounts could be used for the same purposes as the *Trustee Act* or for other purposes and in circumstances other than the discharge of a trustee. The issue is whether trustee legislation should update and expand the provision for passing accounts such that a beneficiary may apply to the court for an order in this regard.

[572] The ULCC comments indicate that Uniform Act section 67 provides a necessary process so that trustees can fulfill legal requirements to provide a "true and just account of trust administration to the court" from time to time. Further, according to the ULCC, passing accounts helps ensure the trustee is performing the duty to keep records of what is being done with trust property.

[573] The ULCC also notes that Uniform Act section 67(3) resolves problems associated with passing accounts if one or more of the beneficiaries are incapacitated by providing that the court can find or deem that the incapacitated beneficiary's interests are represented by another beneficiary whose interests are substantially similar to, and not in conflict with, those of the incapacitated person. The benefit of section 67(3), according to the ULCC, is that it avoids the expensive and unnecessary appointment of a separate representative for an incapacitated beneficiary to appear at the hearing of an application to pass accounts in the event the person's guardian is not able to attend.

[574] In general, it is consistent with modern trust practice that a beneficiary be authorized to apply to the court for an order to pass accounts. However, Uniform Act section 67(2), whereby a qualified beneficiary must serve notice of an application under section 67(1) on all other qualified beneficiaries, poses a difficulty since a beneficiary may not know the identity of the other qualified

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[132] *Trustee Act* states:

> **Application for discharge**
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> **15(2)** When on the application it appears to the satisfaction of the court that it is fit and proper to do so, the court may order that the trustee be discharged from the trust without any new trustee being appointed in the trustee's place, but the court may in that case require the passing of accounts

beneficiaries and would not be able to serve notice of his or her application to pass accounts. Uniform Act section 67(2) should be modified to have the qualified beneficiary making an application for an order to pass accounts serve notice on the trustee, and the trustee then serving notice on the other qualified beneficiaries. This modification resolves the difficulty and satisfies the requirement that qualified beneficiaries be served with notice of an application to pass accounts.

RECOMMENDATION 62

The new Act should authorize qualified beneficiaries and trustees to apply to the court for an order to pass accounts as proposed in Uniform Act section 67.

RECOMMENDATION 63

The new Act should provide that when a qualified beneficiary makes an application, the beneficiary serves the trustee, and the trustee serves the other qualified beneficiaries.

F. Repayment by Trustee

[575] Uniform Act section 68 contemplates a final determination of trustee compensation by the court and repayment if trustee takings exceed what the court decides is fair and reasonable.

[576] The *Trustee Act* does not address repayment. The issue is whether trustee legislation should include a requirement that a trustee repay excess compensation.

[577] The ULCC comments indicate that if a court finally determines that compensation is less than the amount a trustee has taken from trust property without court approval, the trustee must “restore the difference” to the trust.

[578] Uniform Act section 68 is necessary since trustees under the Uniform Act are allowed to take interim compensation without court approval. Further, compensation matters are often contentious. Including the trustee repayment provision in legislation helps ensure that a trustee is accountable for the proper administration of trust property.

RECOMMENDATION 64

The new Act should require a trustee to repay excess compensation as proposed in Uniform Act section 68.

G. Application of Part to Judicial Trustees

[579] Uniform Act section 69 provides that the provisions of an order compensating judicial trustees prevail over any contrary provision in this Part. Judicial trustees were discussed in Chapter 4 with the following recommendation:

> Recommendation 15
>
> The new Act should not provide for the appointment of judicial trustees.

Accordingly, trustee legislation does not need separate provisions for the compensation of judicial trustees and Uniform Act section 69 should not be included.

CHAPTER 16

Charitable Gifts, Charitable Trusts and Non-Charitable Purpose Trusts

A. Power of Court to Vary Charitable Gifts and Charitable Trusts

[580] Currently in Alberta, variations to charitable purpose trusts, like other trusts, are governed first by terms of the trust instrument and then by the *Trustee Act* sections that describe the court's authority to approve variations of trust terms.

[581] As discussed in detail in Chapter 14, the *Trustee Act* section 42 deals with the variation of trusts and specifically provides that, subject to terms in a trust instrument concerning variation, trust terms and conditions may be varied only with court approval. [133] Section 42(5) authorizes the court to approve a variation on behalf of a beneficiary who is incapable of consenting and section 42(9) enables the court to approve variation whereby a gift to a minor or incapacitated beneficiary in a will or testamentary instrument will be held on trust during the period of the beneficiary's incapacity.

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[133] *Trustee Act* states:

> **Variation of trusts**
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> **42(1)** In this section, "beneficiary", "beneficiaries", "person" or "persons" includes charitable purposes and charitable institutions.
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> **(2)** Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench.
>
> ...
>
> **(5)** In approving any proposed arrangement, the Court may consent to the arrangement on behalf of
>
> (a) any person who has, directly or indirectly, an interest, whether vested or contingent, under the trust and who by reason of minority or other incapacity is incapable of consenting,
>
> (b) any person, whether ascertained or not, who may become entitled directly or indirectly to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons,
>
> (c) any person who after reasonable inquiry cannot be located, or
>
> (d) any person in respect of any interest of the person's that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.
>
> ...
>
> **(9)** When a will or other testamentary instrument contains no trust, but the Court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of a minor or other incapacitated beneficiary that the Court approve an arrangement whereby the property or interest taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the Court has jurisdiction under this section to approve that arrangement.

[582] The Uniform Act section 70 gives the court broad powers to vary charitable trusts or gifts on application by a trustee or personal representative. There are differences between the *Trustee Act* provisions and the Uniform Act provisions concerning variations involving charitable trusts. For example, section 70 authorizes a court to override terms of a trust instrument concerning variations, adds the concept that a personal representative may apply for a court order to vary a charitable gift, and expressly changes the law concerning the rules the court applies when approving an arrangement of a charitable gift or charitable trust.

[583] The issue is whether to include specific provisions concerning court approval of variations to charitable gifts and charitable trusts, which change the trustee legislation and law in this regard, in order to reflect modern Alberta trust practice.

[584] In the Uniform Act legislative sections and commentary, the ULCC uses the adjectives "charitable" and "non-charitable" to modify "organization", "gift", "trust" and "purpose". The *Trustee Act* uses the adjective "charitable" to modify "purpose" and "institution". The *Trustee Act* does not include the term "non-charitable." However, three other Alberta statutes use "non-charitable" to modify "purpose" and "trust."[134]

[585] It was not part of the ULCC trust initiative or ALRI's Trustee Project to make recommendations concerning standard or uniform definitions of the terms "charitable" and "non-charitable."[135] However, a modern Alberta definition of "charitable" is provided in the *Charitable Fund-raising Act* which defines a "charitable purpose" as "including a philanthropic, benevolent, educational, health, humane, religious, cultural, artistic or recreational purpose, so long as the purpose is not part of a business."[136]

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[134] See *Charitable Fund-raising Act*, RSA 2000, c C-9 [*Charitable Fund-raising Act*]; *Perpetuities Act*, RSA 2000, c P-5; *Wills and Succession Act*.

[135] Tax policy is a major consideration for charitable organizations and trusts. See *Income Tax Act*, RSC 1985, c 1 (5th Supp) section 248(1) at "registered charity"; section 149.1(1) at "charitable foundation", "charitable organization", "charitable purposes", "charity", and "qualified donee".

[136] *Charitable Fund-raising Act* states:

> **Interpretation**
>
> **1(1)** In this Act.
>
> (b) "charitable organization" means
>
> (i) any incorporated or unincorporated organization that is formed for a charitable purpose. or
>
> (ii) a person who makes solicitations for contributions to be used for a charitable purpose and who is not connected to any incorporated or unincorporated organization that is formed for the charitable purpose for which the solicitation is made:

Continued

1. ACT PREVAILS OVER TERMS OF TRUST INSTRUMENT

[586] Uniform Act section 70 reverses the principle in *Trustee Act* section 42(2) that terms of the instrument concerning variation of a trust for a charitable purpose or charitable organization could limit the court's discretion in this regard. Under the Uniform Act scheme the court has discretion to vary the terms of a trust, even in the face of contrary terms in the instrument. This scheme is further evidenced in Uniform Act section 60, which also prevails over contrary provisions in the trust instrument, and provides for variations to trusts.

2. PERSONAL REPRESENTATIVES

[587] The Uniform Act section 70 specifically provides that it applies to the "personal representative of a donor of a charitable gift." There is a lengthy discussion in Chapter 3 regarding whether trustee legislation should apply generally to personal representatives. As noted, ALRI recommends that trustee legislation not apply to personal representatives in their capacity as personal representatives, and instead estate administration legislation should specifically include those provisions of trustee legislation that ought to apply to personal representatives in their roles as personal representatives.

[588] However, section 70 specifically applies to the "personal representative of a donor of a charitable gift." In this context, the personal representative's role is similar to a trustee; the personal representative holds a charitable gift for its intended recipient, much like a trustee holds trust property for beneficiaries. In the event that a personal representative of a donor of a charitable gift is unable to give effect to the terms of the gift, or a variation would facilitate the carrying out of the intention of the donor, the personal representative ought to have a process for varying the terms of the gift.

[589] Given the similarities between charitable trusts and charitable gifts it is appropriate to have section 70 apply to "personal representatives of a donor of a charitable gift." However, this should not be interpreted to mean that trustee legislation as a whole should apply to personal representatives generally in their roles as personal representatives.

(c) "charitable purpose" includes a philanthropic, benevolent, educational, health, humane, religious, cultural, artistic or recreational purpose, so long as the purpose is not part of a business

3. FACTORS APPLIED TO ALL ARRANGEMENTS

[590] As set out in detail in Chapter 14, ALRI recommends that all arrangements be subject to court approval. When approving arrangements, a court must consider four factors:

- The nature of all interests and the effect any proposed arrangement may have on those interests;
- The benefit or detriment to any person that may result from the court approving, or declining to approve, any proposed arrangement;
- The intentions of the settlor to the extent these can be ascertained; and
- The impact of tax and other statutory provisions.

[591] ALRI recommends that the above factors be considered by a court in respect of any and all variations, including variations involving charitable gifts and charitable trusts.

4. SECTIONS 70(2)-(3)

[592] The Uniform Act section 70(2) provides that on application by a trustee of a charitable trust or by a personal representative of a donor of a charitable gift, the court may vary the terms of the trust or gift in accordance with section 70(3) if the court is of the opinion that:

- An impracticability, impossibility or other difficulty hinders or prevents giving effect to the terms of the trust or gift, or
- A variation of the trust or gift would facilitate the carrying out of the intention of the settlor or donor.

[593] The Uniform Act section 70(3) then provides that in varying the terms of the trust or gift under section 70(2), the court may do one or more of the following:

- Vary, delete or add to the terms of the trust or gift;
- Vary, delete or add to the powers of a trustee in relation to the management or administration of the trust;
- Vary, delete or add to the powers of the donee in relation to the management or administration of the gift; or

- If the court makes a finding under section (2)(a), vary or add to the terms of the trust or gift to provide for a purpose that is as close as is practicable or reasonable to an existing purpose of the trust or gift.

[594] According to the ULCC comments, Uniform Act section 70 incorporates the cy-pres principle with two important changes to the law. One major change to the common law, according to the ULCC, is that the court may make an order varying the purposes of the trust "even if the original purpose has not failed." In this regard, Uniform Act section 70(2)(b) adds that the court may vary the trust or gift in order to facilitate carrying out the original intent. The ULCC notes that this permits the court to, for example, "add a purpose similar in spirit to the original purpose, but where the need may be greater."

[595] As written, Uniform Act section 70(2) affords the possibility that a charitable trust could be reformulated as a non-charitable trust. For example, one could apply to vary a charitable trust because it is impossible to carry out the purpose of the trust and turn it into a family trust. There is nothing in Uniform Act section 70 that precludes this outcome, other than the overriding requirement that any variation of a charitable gift or trust would be subject to court scrutiny.

[596] The possibility of revising Uniform Act section 70(2) was considered. Under section 70(2)(a) the court may vary the terms of a trust or gift if the court is of the opinion that an impossibility, impracticability or difficulty prevents giving effect to the terms of a charitable trust or gift. Under section 70(2)(b) the court may vary if it is of the opinion that the variation would facilitate carrying out the intent of the donor. As the section is currently written, the two concepts are not related and the court could decide to vary the terms of a charitable trust or gift if one or the other condition applies.

[597] The matter of whether it is necessary to include both types of conditions in Uniform Act sections 70(2)(a) and (b) was reviewed. An application to vary a charitable trust under Uniform Act section 70(2)(b) would likely also address problems listed in section (a). The idea of further streamlining the section to permit an application to vary a charitable trust or gift to simply facilitate the settlor's intention is attractive and becomes more so as a charitable trust ages.

[598] However, ultimately it is important to include both conditions in the trustee legislation as provided in Uniform Act section 70(2). This will provide clear guidance on the factors to be considered in applications to vary charitable trusts or gifts and will ensure consistency in the law.

[599] However, in order to emphasize the fact that the court should focus on charitable intentions, Uniform Act section 70(2)(b) should be modified to specify that it is the settlor or donor's *charitable* intent, whether the intent is general or specific, that is to be considered.

5. SECTION 70(4)

[600] The Uniform Act section 70(4) provides that for the purposes of variation under section 70(2), it is irrelevant whether the charitable intent of the settlor or donor was general or specific. However, if the terms of the trust or gift expressly provide for a gift over or a reversion in the event of the lapse or other failure of a charitable purpose, the gift over or reversion, if otherwise valid, may take effect.

[601] Under the cy-pres doctrine, if a charitable purpose trust fails for some reason, a court may order that the trust property be applied to a charitable purpose comparable to the purpose that failed. Uniform Act section 70(4) changes the law in that it removes the common law pre-condition that the court must find that the settlor or donor had a "general charitable intent" before proceeding on an application for a cy-pres order. The ULCC's rationale for the change is that "it can be very difficult to establish such a subjective intent."

[602] As noted above, Uniform Act section 70(4) includes, but does not clearly convey two different concepts. In particular, section 70(4) generally abolishes the distinction between a settlor's general and specific intent as a restriction on what the court can do to vary a charitable trust or gift, then adds that if the trust provides for a gift over or reversion in the event the trust fails or lapses, the gift over or reversion may take effect.

[603] Uniform Act section 70(4) specifically states that when a charitable trust or gift is being varied, the original gift over or reversion "may" take effect. This provision should state that the gift over or reversion "shall" take effect, otherwise the section seems to give the court discretion as to whether to order a gift over or reversion, contrary to a settlor's wishes for his or her property.

[604] Uniform Act section 70(4) could be improved by redrafting it as two sections. The first section should positively state that the court's power to vary a charitable trust is not limited by whether the charitable intent is general or specific. The second section should state that the court shall not vary the charitable trust or gift if the trust terms provide for a valid gift over or reversion if the charitable purpose lapses or fails.

[605] In keeping with the idea that a gift over or reversion may be what the settlor wanted to see happen if the charitable purpose could not take effect, the concept of "gift over and reversion" should be included in Uniform Act section 70(2). In particular, section 70(2) should be modified to state that "…the court may, ***subject to a gift over or reversion expressly provided for in the trust instrument***, vary the terms of the trust or gift in accordance with…."

[606] The purpose of the proposed modifications to Uniform Act section 70 is to make it clear that if the settlor or testator contemplated a failure or lapse of a charitable trust or gift and expressly provided for a gift over or reversion, then the court's ability to vary the charitable trust should be limited.

[607] Although the Uniform Act updates trustee legislation to reflect modern practice and provides additional flexibility for varying charitable trusts and gifts, it is important to continue to respect the intent of the settlor who established the charitable trust or made the gift and, to the maximum extent possible, vary these trusts in ways that are consistent with the original wishes.

RECOMMENDATION 65

The new Act should include court discretion to vary charitable trusts and charitable gifts and this discretion should prevail over contrary terms in a trust instrument.

RECOMMENDATION 66

The new Act should provide that a court may vary the terms of a gift or trust if it would facilitate the carrying out of the *charitable* intention of the settlor or donor.

RECOMMENDATION 67

The new Act should clearly state that the distinction between general and specific intent no longer limits the court's authority to vary.

RECOMMENDATION 68

The new Act should clearly establish that if the trust instrument specifies an express gift over or reversion, then the gift over or reversion, if otherwise valid, *shall* take effect.

B. Surplus Arising from Public Appeal

[608] The *Trustee Act* does not apply to excess funds generated as a result of a public appeal to put money into trust, for example, to provide support to a family who has lost its home to a fire. In contrast, Uniform Act section 71 provides a scheme to deal with a surplus that arises when funds are collected by way of public appeal.

[609] According to the ULCC, difficulty arises if the purpose for which the money is collected is not a charitable purpose and the public appeal has been "constituted" with no thought as to what to do with excess funds. In these circumstances under the common law there are only two options: the excess money can either accumulate interest "indefinitely" or be paid into court.

[610] Uniform Act section 71 changes the law and provides a legislative scheme for refunding the excess money to donors, provided there has been no application to vary the trust made under Uniform Act section 70 and no application under Uniform Act section 75 to characterize the excess as property held for a charitable or non-charitable purpose trust.

[611] The issue is whether trustee legislation should include provisions to govern the use of surplus funds raised as the result of a public appeal.

[612] According to the ULCC, Uniform Act section 71 should be included in trustee legislation in jurisdictions that do not implement the 2011 Uniform Informal Public Appeals Act.[137]

[613] Uniform Act section 71 represents a noble trust concept that funds given for a particular purpose ought to be used for that purpose, or returned to the donor if the donor states that unused money is to be refunded. However, the proposed section is impractical for several reasons. First, there is a fundamental difference between a settlor giving property in trust and donor making a donation. A donor typically does not give funds with any express instruction as to how the money is to be used.

[614] Second, Uniform Act section 71 may impose new and costly administrative burdens on a trustee appointed as trustee for a public fund. It

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[137] The Working Group on a Uniform Informal Public Appeals Act advised the ULCC in 2011 that "[r]eform should be pursued through a stand-alone act dedicated to public appeal funds rather than as an amendment to an existing *Trustee Act*" [footnote omitted], online: <www.ulcc.ca/images/stories/2011_pdf_en/2011ulcc0011.pdf>.

would be difficult to get written instructions from every donor concerning what to do if all the money gathered is not used and to devise and implement an appropriate refund programme.

[615] Third, Uniform Act section 71 does not seem critical since a trustee holding excess funds may apply under the proposed trustee legislation to the court for an order to vary terms of the charitable gift to use the funds for another good cause or purpose.

[616] It is not necessary or advantageous to include Uniform Act section 71 in trustee legislation as implementing the proposed provision would be impractical.

RECOMMENDATION 69

The new Act should not include provisions governing the use of surplus funds raised as a result of a public appeal as proposed in Uniform Act section 71.

C. Power to Order Sale of Property – Charitable Trust

[617] There is no provision in the *Trustee Act* that specifically governs the sale of property held in trust for a charitable purpose. However, *Trustee Act* section 42 is broadly worded and may have been used in the past to authorize sales of trust property held for charitable purposes.

[618] The Uniform Act section 72 gives the court express authority to approve the sale of property held in trust for a charitable purpose and issue directions concerning the conduct of the sale and use of proceeds. Further, section 72 prevails over contrary provisions in a trust instrument.

[619] The issue is whether trustee legislation should expressly authorize the court to approve and direct the sale of property that is held in trust for a charitable purpose.

[620] According to the ULCC, Uniform Act section 72 is included to accommodate situations where property held in trust for a particular charitable purpose is no longer useful for that charitable purpose or should be sold for some other reason.

[621] Uniform Act section 72 is not inconsistent with the court's existing authority to make orders concerning property held in trust for a beneficiary, including a charitable purpose. The section is a good addition to trustee

legislation, particularly since the express requirement that the court oversee the sale process ensures that proceeds of the sale will be used appropriately.

D. Notice to the Attorney General – Charitable and Non-Charitable Purposes

[622] Uniform Act section 73 provides a statutory mechanism for the Attorney General to receive notice of and participate in applications respecting charitable gifts and charitable trusts. Uniform Act section 61(4) provides statutory mechanisms for the Attorney General to oversee arrangements respecting charitable and non-charitable purpose trusts. There are no similar provisions in the *Trustee Act*.

[623] In particular, Uniform Act section 73 provides that an order dealing with charitable trusts under sections 70, 71 and 72 cannot be made unless the Attorney General is served with notice of the application for the order at least 30 days before the application hearing date. Similarly, Uniform Act sections 61(2) and (4) provide that, on applications for an order concerning arrangements for charitable organizations, charitable purposes or non-charitable purposes, the Attorney General must be notified at least 30 days before the hearing and is entitled to appear and be heard.

[624] The issue is whether trustee legislation should expressly provide that the Attorney General must be notified of, and may participate in, applications concerning charitable gifts and charitable and non-charitable purpose trusts.

[625] The ULCC notes that "[t]he Attorney General is the guardian of the public interest in all matters relating to charities" and should be notified of applications which may affect a charitable trust.

[626] The Attorney General has been described as having a *parens patriae* responsibility for charitable activities.[138]. It would provide clear guidance if trustee legislation included the provisions in the Uniform Act that expressly state the Attorney General must be advised of applications concerning charitable gifts and charitable and non-charitable purpose trusts.

[627] Uniform Act section 73 specifically states that notice of an application to vary a charitable trust, pursuant to section 70, must be given to the Attorney

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[138] *Rowland v Vancouver College Ltd*, 2000 BCSC 1221 at para 71; *Nova Scotia (Attorney General) v Landry* (1911), 45 NSR 298 (SC) at para 7.

General. Section 73 seems to be missing the requirement that a party making such an application give notice to others who have an interest in the matter. For example, a specific charity that is the beneficiary of the trust would want to be advised of an application to vary the trust. In the case of trusts that fund more than one charitable organization, or situations involving an express gift over or reversion, there would be identifiable other parties that should be given notice of an application to vary the trust. However, there could be a "floodgate" problem in terms of identifying whom to serve, if for example, the application to vary a charitable trust was intended to change the purpose of the charitable trust so that it can continue to function.

[628] As noted earlier there is also the question of which government office should receive such notice given the changes in legislative responsibilities.

[629] In order to provide clear guidance, enhance certainty and be consistent with other provisions in the proposed trustee legislation concerning applications to vary trusts that are not charitable in nature, Uniform Act section 73 should provide that others who have an interest in the charitable trust or trust property receive notice of an application to vary. In particular, section 73 should be modified to require that a person who makes an application to vary a charitable trust or gift must serve notice of the application on the appropriate government office and such other persons as the court may require.

RECOMMENDATION 70

The new Act should provide that a person who applies to vary a charitable trust or gift must give notice to the appropriate government office and such other persons as the court may require.

E. Non-Charitable Purpose Trust

[630] The *Trustee Act* does not address the issue of non-charitable purpose trusts; however, some non-charitable purpose trusts are addressed in other Alberta legislation. For example, one traditional form of non-charitable purpose trust is a trust established for the ongoing care of graves; these trusts are regulated as a perpetual care fund under the *Cemeteries Act*.[139]

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[139] *Cemeteries Act*, RSA 2000, c C-3, ss 32-41. See also Waters at 672-3, note 44.

[631] In contrast with the *Trustee Act*, Uniform Act section 74 provides a legislative scheme to validate and regulate non-charitable purpose trusts. On application by a trustee, the court may also establish a non-charitable purpose trust under Uniform Act sections 75(3)(b)(d) or (f). Further, Uniform Act section 60(7)(b) authorizes the court to approve a variation to terms of a non-charitable purpose trust.

[632] The issue is whether trustee legislation should provide for the validation and regulation of non-charitable purpose trusts and, if so, whether the provisions of Uniform Act section 74 reflect Alberta practice in this regard.

[633] On the broader general topic of whether trust legislation should provide a mechanism to validate non-charitable purpose trusts, one Advisory Committee member expressed the view that this may not be an area in need of reform. As the law stands today, there are a few non-charitable purposes that can exist as trusts, with the rest being allowed to function as powers of appointment for 21 years.

1. LEGISLATIVE SCHEME FOR NON-CHARITABLE PURPOSE TRUSTS

[634] According to the ULCC, the intent of Uniform Act section 74 is to "validate the creation of trusts for certain non-charitable public purposes." It also expands the law to include gifts for non-charitable purposes other than those made for the "narrow range" of purposes currently recognized under the common law.[140]

[635] The ULCC comments on Uniform Act section 74 indicate some of the beneficial aspects of the legislation:

- Provides the authority to create a trust for a non-charitable purpose;
- Defines "non-charitable purpose trust" as
    - one already recognized at law (i.e. for the maintenance of a grave or tomb, erection of a monument at a burial site, or provision of food and shelter for specified animals)

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[140] In terms of an additional opinion concerning non-charitable purpose trusts, *Waters'* surveys the existing legislative approaches and leading cases concerning non-charitable purpose trusts, and states that "It might go too far to suggest that … the *Peace Hills* case … establishes that non-charitable purpose trusts are now valid in Canada." (*Waters'* at 672).

For a more detailed analysis see also Donovan Waters, "Non-Charitable Purpose Trusts in Common Law Canada" (2008) 28:1 EJPJ 16.

OR

- for a purpose that is:

  (a) certain enough to allow it to be carried out;

  (b) not contrary to public policy; and,

  (c) related to:

    (i) purposes already established in legislation;

    (ii) the performance of a government function; or

    (iii) a purpose to be specified in regulations;

- Permits a non-charitable purpose trust to exist indefinitely, unless otherwise stated in the trust instrument;
- Describes the court's authority to vary terms of a non-charitable purpose trust or otherwise deal with the trust property; and
- Removes the major reason for the "traditional hostility" at law by authorizing the court to make orders to enforce or vary a non-charitable purpose trust and enabling several entities, including the Attorney General and persons who the court considers "to have sufficient interest in the matter", to make an application to the court.

[636] Other policy factors to consider include the possible effects of implementing Uniform Act section 74 on existing non-charitable purpose trusts, their trustees, the courts and the provincial taxation regime. Other factors to consider are the need for government oversight and regulatory functions.

[637] The current limits on non-charitable purpose trusts exist for a number of reasons, the main one relating to the question of who is going to enforce the trust. The fundamental nature of a trust is that there is a separation of legal and beneficial property interests, with the party holding the beneficial interest having an *in personam* right to enforce terms of the trust. A purpose trust does not have a party that can enforce the trust. The Attorney General, or other government office charged with these matters, may be willing to enforce terms of charitable trusts and the existing range of non-charitable purpose trusts, but it is not known whether that office would be amenable to also being the enforcer for an expanded number of purpose trusts that could be set up and validated pursuant to the uniform provisions.

[638] Looking at the specific sections that validate and regulate non-charitable purpose trusts, Uniform Act section 74(3) contains three conditions for a purpose trust to be valid. The first two are fairly simple, requiring only that the purpose be sufficiently certain and not contrary to public policy. However, the requirements in section 74(3)(c) provide a restriction on the number of new non-charitable purpose trusts that may be established.

[639] For example, Uniform Act sections 74(3)(c)(i) and (iii) require that the non-charitable purpose be one that is legislated in order to create a valid trust either because the purpose is stated under the *Societies Act* or specified by regulation. There are no legislated purposes under the *Societies Act* and section 74(3)(c)(i) should not be included in the new Act. There are currently no purposes recommended for regulation as valid non-charitable purposes under section 74(c)(iii).

[640] Uniform Act section 74(3)(c)(ii), which provides for trusts for the performance of a function of government in Canada, is a likely source of new non-charitable purpose trusts. The common law currently allows for pet trusts and a few other non-charitable purpose trusts which have been validated in historical cases. The common law and legislation do not currently work in terms of establishing an ongoing trust for purposes which are considered beneficial to modern society, such as those typically carried out by community groups or organizations. Section 74(3)(c)(ii) could potentially be used to add to the list of modern, valid non-charitable purpose trusts, such as those established to fund preservation of a building or community-based activities.

[641] Uniform Act section 74(3)(c)(ii) as drafted is consistent with federal tax policy in that, similar to charitable purpose trusts, a non-charitable purpose trust established under this provision would likely be exempt from federal taxation.[141]

[642] It is contemplated that, as the law concerning validation of new non-charitable purpose trusts develops, the government would likely create a list of valid non-charitable purposes in a regulation.

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[141] The miscellaneous exemption provisions of the *Income Tax Act*, RSC 1985, c 1(5th Supp), s 149(1)(c), provide, in part that:

> **Miscellaneous exemptions**
>
> **149(1)** No tax is payable under this Part on the taxable income of a person for a period when that person was
>
> ...
>
> (c) a municipality in Canada, or a municipal or public body performing a function of government in Canada;

[643] Uniform Act section 74(10) provides for the court to make orders considered appropriate to enforce a non-charitable purpose trust, or enlarge or otherwise vary the powers of the trustees of a non-charitable purpose trust. Section 74(11) provides an extensive list of parties who can make applications for orders in relation to non-charitable purpose trusts, namely:

- The appropriate government office;
- A person appointed specifically by the settlor in the trust instrument to enforce the trust;
- The settlor;
- The personal representative of the settlor;
- The trustee; or
- A person appearing to have a sufficient interest in the matter.

RECOMMENDATION 71

The new Act should provide a mechanism to validate and regulate non-charitable purpose trusts as proposed in Uniform Act sections 74(1)-(4) and (10)-(12), excluding section 74(3)(c)(i).

2. VARIATION OF NON-CHARITABLE PURPOSE TRUSTS

[644] As set out in detail in Chapter 14, ALRI recommends that all arrangements be subject to court approval. In approving arrangements, a court must consider four factors:

- The nature of all interests and the effect any proposed arrangement may have on those interests;
- The benefit or detriment to any person that may result from the court approving, or declining to approve, any proposed arrangement;
- The intentions of the settlor to the extent these can be ascertained; and
- The impact of tax and other statutory provisions.

[645] ALRI recommends that the above factors be considered by a court in respect of any and all arrangements, including variations of non-charitable purpose trusts.

[646] The Uniform Act sections 74(5)-(9) deal with variations to non-charitable purpose trusts. First, Uniform Act section 74(5) provides that, subject to section 74(8), if the court is of the opinion that an impracticability, impossibility or other difficulty hinders or prevents giving effect to the terms of a non-charitable purpose trust, the court may:

- Vary or add to the terms of the trust to provide for a purpose that is as close as is practicable or reasonable to an existing purpose of the trust; or

- If the court is unable to provide for a purpose that is as close as is practicable or reasonable to an existing purpose of the trust, vary or add to the terms of the trust to provide for a purpose that is consistent with the intention of the original settlement.

[647] Under section 74(6), subject to section 74(8), if the court is of the opinion that a change in circumstances since the creation of the non-charitable purpose trust has resulted in a purpose of the trust being obsolete or no longer expedient, the court may vary or add to the terms of the trust to provide for a purpose that is consistent with the intention of the original settlement. In exercising its power under section 74(6), the court may consider the views of the settlor or the trustee concerning the obsolescence or expedience of the purpose of the trust and the proposed variation.

[648] Under section 74(8), sections (5) and (6) do not apply, and the non-charitable purpose trust cannot be varied, if:

- The trust instrument contains a valid direction concerning the ultimate disposition of the trust property; or

- The intention of the settlor concerning the ultimate disposition of the trust property can be inferred from the trust instrument and is valid.

[649] As well, under section 74(9), despite sections 74(5) and (6), if the court cannot determine a substitute purpose for a non-charitable purpose trust, the court may order that the trust property be returned to the settlor or to the settlor's personal representative.

[650] The ULCC commentary on Uniform Act sections 74(5)-(9) states that the provisions "provide for the ability of the court to deal with circumstances in which the purpose of a trust has failed. They allow the court to approve a substitute purpose, which may also be non-charitable, or order another disposition of the trust property.

F. Imperfect Trust Provisions – Charitable and Non-Charitable Purposes

[651] The *Trustee Act* does not address situations in which trust property is intended to be used for a mix of charitable and non-charitable purposes.

[652] In Alberta, the concept of property given to advance a mix of charitable and non-charitable purposes is contemplated in the *Wills and Succession Act* section 35. This provision states that when a testator disposes of property, by trust or outright gift, for a charitable purpose that is linked to a non-charitable purpose, the trust or gift is not rendered void simply because the non-charitable purpose is void. Rather, the gift is effective only for the benefit of the charitable purpose. Further, the trust or gift is effective for the charitable *and* non-charitable purposes if the non-charitable purpose is not void, and must be divided between the two purposes according to the trustee's or executor's discretion, unless the will otherwise directs.[142]

[653] Uniform Act section 75 reflects the principle stated in the *Wills and Succession Act* and expands it, particularly in term of stipulating the types of orders the court may make. It also adds that, subject to relevant terms in a trust instrument, a trustee may exercise discretion concerning apportionment of trust property. Section 75 further specifies that the use of the terms "benevolent", "worthy" or "philanthropic" indicate a charitable purpose trust. Section 75 is subject to contrary provisions in a trust instrument.

[654] The issue is whether trustee legislation should provide guidance as to how the court addresses situations in which trusts have a mix of charitable and non-charitable purposes.

[655] The ULCC indicates that the intent of Uniform Act section 75 is to resolve the problem that a trust created for both charitable and non-charitable purposes will often fail. According to the ULCC, failure can happen in two ways. First, when a settlor intends a charitable purpose but uses words which, although

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[142] *Wills and Succession Act* states:

> **Gift for charitable purpose**
>
> **35** If a testator disposes of property, whether by way of a trust or by outright gift, for a charitable purpose that is linked conjunctively or disjunctively in the will with a non-charitable purpose, the trust or gift
>
> (a) is not rendered void only because the non-charitable purpose is void for uncertainty or for some other reason, but in that case the gift is effective only for the benefit of the charitable purpose, and
>
> (b) is effective for the benefit of both purposes if the non-charitable purpose is not void, and must be divided among the charitable and non-charitable purposes according to the trustee's or executor's discretion unless the will directs otherwise.

generally indicate a charitable purpose, do not meet the legal definition of charitable. Second, a settlor may set the trust up with both charitable and obviously non-charitable purposes.

[656] According to the ULCC, Uniform Act section 75(5) resolves the first problem by establishing the entire trust for charitable purposes, provided there is a charitable purpose and other imprecisely described purposes which seem to be charitable.

[657] The ULCC notes that section 75 also solves the second problem by providing that a mixed charitable/non-charitable purpose trust is not void and permitting a trustee to apply for a court order whereby the court orders various purposes of the trust to be carried out.

[658] The ULCC points out that if a court orders the separation of the purposes under a trust instrument into various different trusts, the trustee must divide the trust property in a reasonable manner that is consistent with apportionment terms, if any, in the trust instrument.

[659] Uniform Act section 75 serves an important remedial function by allowing the court to save trusts that are at risk of failing. The section is useful in terms of explaining how to rectify imperfect situations and provides direction as to how the trust should function. However, Uniform Act section 75 provides for an application to be brought only by a trustee; ALRI recommends that a beneficiary also be able to bring an application under section 75.

G. Trust Property Held for Charitable Purposes Not to be Seized

[660] Uniform Act section 77 provides that trust property held for specific charitable purposes is exempt from seizure, execution or attachment to satisfy a judgment against a trustee or charitable corporation, unless the judgment is based on a liability incurred in relation to the specific charitable purpose.

[661] There are no similar provisions in the *Trustee Act* or any other Alberta statute that touches on trust matters (i.e. the *Wills and Succession Act, Estate Administration Act* or *Charitable Fund-raising Act*).

[662] The issue is whether it is appropriate for trustee legislation to exempt property held in trust for specific charitable purposes from civil enforcement proceedings.

[663] According to the ULCC, Uniform Act section 77 is intended to "restate the law respecting the non-exigibility of property held by a trustee for a specific charitable purpose." The purpose of the section is to reverse the effects of the Ontario Court of Appeal's decision in *Christian Brothers of Ireland in Canada (Re).*[143] It also reflects the recommendations in the British Columbia Law Institute's 2003 report titled *Creditor Access to the Assets of a Purpose Trust.*[144]

[664] The ULCC explains that in the event of a judgment against a charitable organization or trustee, Uniform Act section 77(1) provides that trust property held for a specific charitable purpose (as distinguished from property held generally by the organization or trustee for trust purposes) will not be subject to civil enforcement processes, unless the liability of the charitable organization or trustee is related to the specific charitable purpose. In addition, Uniform Act section 77(2) gives the exemption "retroactive effect."

[665] The Uniform Act section 77 attempts to pre-emptively address a matter of civil enforcement which is generally a matter determined by the court on a case by case basis. It is not appropriate to include Uniform Act section 77 in trustee legislation.

RECOMMENDATION 72

The new Act should not exempt property held in trust for specific charitable purposes from civil enforcement proceedings.

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[143] *Christian Brothers of Ireland in Canada (Re)*, (2000) 47 OR (3d) 674 (CA). The Ontario Court of Appeal determined that two Vancouver schools held by the CBIC through separate purpose trusts were assets that could be liquidated to satisfy a judgment arising out of incidents that occurred in Newfoundland and were unrelated to the Vancouver schools.

[144] Of note, British Columbia enacted the *Charitable Purposes Preservation Act*, SBC 2004, c 59 to achieve the same effect.

CHAPTER 17

Additional Powers of the Court

A. Non-performance by Trustee

[666] The Uniform Act enhances the common law powers the court has when responding to a beneficiary's application alleging that a trustee has failed to perform his or her duty. Uniform Act section 78 provides that a court can order a trustee to perform a duty or give due consideration to the exercise of power, or the court can remove the trustee.

[667] The issue is whether trustee legislation should empower beneficiaries to seek court remedies in the event a trustee is not performing his or her duties or is exercising power in an inappropriate manner.

[668] The ULCC comments indicate that section 78 adds to the common law which currently gives beneficiaries the right to ask for a trustee to be removed if trustee inactivity puts the best interests of beneficiaries at risk. In particular, according to the ULCC, section 78 "empowers the beneficiaries to seek redress in a wider range of circumstances."

[669] Under section 78, a court cannot force a trustee to make a particular decision but a court can require a trustee to make a decision that he or she should be making. In other words, the section means that the court can order a trustee to carry out his or her trustee duties. It is important to include this section to put trustees on notice that they can be ordered to do the things they are supposed to do and if they refuse to do so, they can be removed.

[670] Uniform Act section 78 may help a beneficiary ensure that a trustee is performing his or her duties. In particular, the trustee's duties to report and provide specific information to beneficiaries under Uniform Act sections 28 and 29, combined with the prospect of a court application under Uniform Act section 78, give beneficiaries the necessary tools in this regard.

[671] This expansion of beneficiary rights is consistent with modern trust practice and with other sections of the proposed trustee legislation that expand and clarify trustee duties, authority and statutory protection. However, ALRI recommends that a trustee also be able to make an application under section 78. This allows a trustee to bring an application when a co-trustee is not performing under the Act.

B. Trustee May Apply to Court for Directions

[672] The Uniform Act section 79(1) specifically allows a trustee to apply to the court for directions on any matter or question of fact, law or discretion arising in respect of a trust. Further, if trustees are deadlocked on any matter, one or more trustees may apply to the court to resolve the matter.

[673] Section 79(3) provides that a trustee who follows the directions of a court is discharged with respect to the subject matter of the directions, unless the trustee is guilty of fraud, wilful concealment or misrepresentation in obtaining the directions.

[674] It is appropriate and consistent with good trust practice for trustee legislation to allow a trustee to apply to the court for directions related to the trustee's role under the trust. It is also appropriate to relieve trustees from liability on subject matters on which the trustees have received directions from the court.

C. Trustee May Apply to Court for Order Respecting Distribution of Trust Property

[675] The Uniform Act section 80 provides for trustees to make applications to court respecting the distribution of trust property. Specifically, section 80(1) provides that, on application by a trustee, a court may authorize a trustee to distribute trust property among persons entitled to receive that property, with the trustee having regard only to:

- The persons whom the trustee has been able to locate after making diligent efforts; or
- The claims and interests that the trustee has been able to determine after making diligent efforts.

[676] Further, under section 80(2), in making an order the court may give directions respecting procedures to be followed by the trustee in relation to the property distribution, including, without limitation, directions concerning the notice that must be given to persons who may have an interest in the property distribution.

[677] Finally, pursuant to section 80(3), an order under this section does not prejudice the right of a creditor or claimant to follow trust property into the hands of a recipient.

[678] The ULCC notes that this section allows a trustee to obtain permission from a court to distribute trust property among creditors and beneficiaries of whom a trustee is aware, and to distribute trust property to satisfy claims and interests that a trustee has been able to ascertain.

[679] The *Trustee Act* section 38 is similar to section 80.[145] Under *Trustee Act* section 38, when a trustee is an executor or administrator or is acting under a trust for the benefit of creditors generally or for the benefit of a particular class or classes of creditors, the trustee may distribute trust property among the parties entitled to it, in certain circumstances. Further, the trustee is not liable to any person if the trustee did not have notice of their claim at the time of the distribution.

[680] Uniform Act section 80 is broader and relates to all trustees who want to distribute trust property in a timely manner.

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[145] *Trustee Act* states:

> **Creditors**
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> **38(1)** When, in the opinion of the court in which the trustee, assignee, executor or administrator is sought to be charged,
>
> (a) a trustee or assignee acting under the trusts of a deed or assignment
>
> (i) for the benefit of creditors generally, or
>
> (ii) for the benefit of a particular class or classes of creditors where the creditors are not designated by name in the deed or assignment,
>
> or
>
> (b) an executor or administrator,
>
> has given the same or like notices that would have been given by the Court of Queen's Bench
>
> (c) in an action for the execution of the trusts of the deed or assignment, or
>
> (d) in an administration suit,
>
> for the creditors and others to send in to the trustee, assignee, executor or administrator their claims
>
> (e) against the person for the benefit of the creditors of whom the deed or assignment is made, or
>
> (f) against the estate of the testator or intestate,
>
> as the case may be, then the trustee, assignee, executor or administrator
>
> (g) may, at the expiration of the time named in the notices or the last of the notices for sending in those claims, distribute the proceeds of the trust estate or the assets of the testator or intestate, as the case may be, or any part of them among the parties entitled to them, having regard to the claims of which the trustee, assignee, executor or administrator has then notice, and
>
> (h) is not liable to any person, of whose claim the trustee, assignee, executor or administrator had not had notice at the time of distribution, for the proceeds of the trust estate or assets, as the case may be, or any part of them distributed.
>
> **(2)** Nothing in this Act prejudices the right of a creditor or claimant to follow the proceeds of the trust estate or assets, as the case may be, or any part of them into the hands of the persons who have received them.
>
> **(3)** This section shall be read subject to the *Bankruptcy and Insolvency Act* (Canada).

D. Trustee May Be Relieved of Liability for Breach of Trust

1. COURT RELIEF FROM LIABILITY

[681] Under *Trustee Act* section 41, when it appears to a court that a trustee is or might be personally liable for a breach as trustee, the court may relieve the trustee from personal liability, either wholly or partly, if the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust.[146]

[682] Uniform Act section 81 also describes when a trustee may be relieved of personal liability. Section 81(2) provides that the court may relieve a trustee or former trustee of personal liability if satisfied that the trustee "acted (i) honestly and reasonably, and (ii) ought fairly to be excused." These grounds are consistent with existing Alberta legislation and reflected in recent cases.[147]

2. EXEMPTION CLAUSES

[683] Uniform Act section 81 also addresses the impact of exemption clauses on liability. Section 81(1) defines the term "exemption clause" as a provision that would exclude or restrict a trustee's liability and includes several examples.

[684] Section 81(3) states that an exemption clause in a trust instrument is effective according to its terms to relieve a trustee from liability for a breach of trust. Pursuant to section 81(4), the effectiveness of an exemption clause is subject to the court's ability to declare it ineffective in the event a trustee's conduct is "so unreasonable, irresponsible or incompetent that, in fairness to the beneficiary" the trustee should not be excused from liability.

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[146] *Trustee Act* states:

> **Personal liability**
>
> **41** If in any proceeding affecting trustees or trust property it appears to the court
>
> (a) that a trustee, whether appointed by the court or by an instrument in writing or otherwise, or that any person who in law may be held to be fiduciarily responsible as a trustee, is or might be personally liable for any breach, whether the transaction alleged or found to be a breach of trust occurred before or after the passing of this Act, but
>
> (b) that the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed that breach,
>
> then the court may relieve the trustee either wholly or partly from personal liability for the breach of trust.

[147] See for example *Taubner Estate (Re)*, 2010 ABQB 60 at para 287 where the court said

> A trustee who has failed to meet the "prudent investor" standard has undoubtedly acted unreasonably, and may have acted negligently. But if the trustee has acted honestly and in good faith, and for the benefit of the donor or the beneficiaries (as opposed to acting in his or her own self-interest), the court may still be satisfied that the trustee has met the onus of showing that it would be fair and reasonable in the circumstances to relieve the trustee from personal liability.

[685] The issue is whether to change Alberta's trustee legislation by implementing the new Uniform Act provisions that presumptively validate the effectiveness of exemption clauses to protect a trustee from liability.

[686] The ULCC indicates that the exemption clause section is included to clarify how such clauses work to shield a trustee from liability. The policy goal of the section is to balance the protection of beneficiary interests against the settlor's right to put terms in trust instruments to protect trustees from liability. The overall exemption clause scheme provides that an exemption clause is effective unless a court decides to grant relief to a beneficiary. Further, the ULCC notes that the application for relief is to be filed by a beneficiary, although the text of section 81(4) does not specifically say that.

[687] Exemption clauses have been studied by a number of groups, including the British Columbia Law Institute as part of its reform efforts which culminated in *A Model Trustee Act for British Columbia* in 2004. The Society for Trust and Estate Practitioners Canada also addressed exemption clauses at its 2007 conference. Further, trust companies named as trustees in wills often require that exemption clauses be expressly included in the wills.

[688] In practice, exemption clauses are practical and necessary to protect trustees. That said, it is important that the legislation clearly explain the proper use of exemption clauses and retain court discretion to step in when needed to address cases of egregious conduct. Uniform Act section 81 clarifies the concept and use of exemption clauses and may make it easier for courts to determine whether a particular clause ought to be effective. In addition, the provision puts trustees on notice that, regardless of what an exemption clause may say, trustee conduct is still subject to court scrutiny.

[689] With respect to procedure, ALRI is of the view that an application under section 81 should be able to be brought by a beneficiary, trustee, or secured party.

E. Contribution and Indemnity

[690] Uniform Act section 82 sets out a court supervised process for determining contribution and indemnity as between co-trustees in the event of a breach of trust.

[691] The issue is whether the common law rules concerning contribution and indemnification should be replaced with legislative provisions that describe a

court supervised process for the determination of co-trustee contribution and indemnification matters. Adding these provisions to trustee legislation would expand the role of the court in trust relationships.

[692] According to the ULCC, Uniform Act section 82 is intended to be the sole mechanism by which a trustee is required to make a contribution to or indemnify other trustees. In particular, the ULCC comments concerning Uniform Act section 82(3) state that it is "only as provided in this section, rather than as previously pursuant to common law" that a trustee has any obligations concerning contribution or indemnity for breach of trust.

[693] The ULCC comments summarize the existing common law concerning equal share contributions by each trustee liable for a breach of trust. They also describe the three situations in which a co-trustee is required to indemnify other trustees: trustee fraud, solicitor trustee giving incorrect legal advice, and, if the trustee is also a beneficiary, the trustee must indemnify co-trustees to the extent of the trustee's beneficial interest. According to the ULCC, beyond these three situations it is unclear whether a co-trustee has any right to indemnification at common law.

[694] The ULCC also indicates that section 82 is a logical extension of the court's authority under Uniform Act section 81(2) which provides that a court may relieve a trustee or former trustee from personal liability in certain circumstances.

[695] From a practical perspective, breach of trust matters are determined by the court and it would expedite final resolution of these disputes if the associated apportionment of liability and co-trustee responsibility to contribute to or indemnify were both decided by the same court at the same time. It may also enhance public confidence in the justice system.

[696] Further, including Uniform Act section 82 in trustee legislation would be beneficial in terms of codifying and spelling out the obligations as between co-trustees. In particular, it is good practice to inform trustee clients that, in the event of a breach, the trustee may incur some personal liability and may also be required to indemnify others. The presence of Uniform Act section 82 in trustee legislation would help to clearly explain and enforce this point.

F. Beneficiaries Instigating Breaches of Trust

[697] Uniform Act section 83 provides that a beneficiary who instigates, requests or consents to a breach of trust can be ordered to contribute to or indemnify the trustee or persons claiming through the trustee A breach of trust cannot be excused because of the authorization of one or more beneficiaries. Essentially, this section puts beneficiaries on notice that if they authorize a breach of trust they will have to pay for it. A beneficiary's interest in the trust can be made available to satisfy that beneficiary's obligation of contribution or indemnity.

[698] *Trustee Act* section 26 is very similar to Uniform Act section 83; however, section 26 has some antiquated language regarding married women. [148]

[699] The Uniform Act section 83 is a modern version of *Trustee Act* section 26 and should be included in trustee legislation.

G. Payment Into Court

[700] The Uniform Act section 84(1) allows a trustee to pay or deposit trust money or securities into court. Section 84(2) allow a person in possession or control of trust money or securities to pay or deposit such money or securities into court if a trustee is not available to receive payment, or to transfer the money or securities and give a receipt. Under section 84(3), a proper officer of the court can give a receipt for money or securities paid or deposited in court under sections 84(1) and (2). This relieves the trustee or other person paying or depositing the money or securities from any further obligation relating to the money or securities.

[701] Finally, under section 84(4), the court may make orders it considers necessary or appropriate regarding the trust money or securities paid into court. The court may also make orders governing the administration of the trust to which the money or securities are subject.

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[148] *Trustee Act* states:

> **Breach of trust at instigation of beneficiary**
>
> **26** When a trustee has committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the court may, if it thinks fit, and notwithstanding that the beneficiary is a married woman entitled for her separate use, whether with or without a restraint on anticipation, make any order that to the court seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through the trustee.

[702] Uniform Act section 84 is similar to *Trustee Act* section 40.[149] *Trustee Act* section 40(3) refers to situations where money or securities are vested in trustees and the majority want to pay them into court, but the consent of the others cannot be obtained. In such a situation, *Trustee Act* section 40(3) allows the Court to order payment into court to be made by the majority, without the consent of the others.

[703] Given the new majority rule provisions recommended in the Uniform Act and in this Report, *Trustee Act* section 40(3) may no longer be necessary. In any event, Uniform Act section 84(4) gives the court the power to make any orders it deems necessary or appropriate to deal with trust money or securities paid into court, as well as to deal with the administration of the trust in question. This provision would likely remove any further necessity for *Trustee Act* section 40(3).

H. Who May Apply to Court for Order

[704] As discussed in Chapter 2, the Uniform Act section 85 is a default rule with respect to who is entitled to apply for various orders that may be made under the Act. Section 85 is referenced in other sections throughout the Uniform Act.

[705] However, as previously recommended in the Report, ALRI is of the view that section 85 should not be included in the new Act. Instead, each section that refers to court applications should include a subsection setting out who can bring the pertinent application.

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[149] *Trustee Act* states:

> **Payment into court**
>
> **40(1)** Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust or to the estate of a deceased person, may pay them into the Court of Queen's Bench, and they shall, subject to the rules of court, be dealt with according to the orders of the Court.
>
> **(2)** The receipt or certificate of the proper officer is sufficient discharge to trustees for the money or securities so paid into court.
>
> **(3)** When any money or securities are vested in any person as trustees and the majority are desirous of paying them into court, but the concurrence of the other or others cannot be obtained, the Court of Queen's Bench may order the payment into court to be made by the majority without the concurrence of the other or others, and if any money or securities are deposited with a banker, broker or other depository, the court may order payment or delivery of the money or securities to the majority of the trustees for the purpose of payment into court.
>
> **(4)** Every transfer, payment and delivery made pursuant to an order under subsection (3) is valid and takes effect as if it had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid or delivered.

I. Costs Paid by Party or Out of Trust Property

[706] The Uniform Act section 86(1) provides that a court may order costs of a proceeding under trustee legislation, in the amounts or proportions the court deems appropriate, to be paid:

- By or to a party to the proceedings; or
- Out of the trust property.

[707] Pursuant to Uniform Act section 86(2) the court may order costs of a transfer or other transactions respecting trust property, in the amounts or proportions the court deems appropriate, to be paid out of the trust property. Pursuant to section 86(3), the court may order costs to be drawn from all or part of the trust property.

[708] The ULCC commentary notes that ordinarily costs are paid by the party who is unsuccessful in a proceeding. However, in trust proceedings there may be no one opposed to an application, or a party may only question the application to ensure the terms of the trust are being considered. In such cases, it may be appropriate for the court to award costs from the trust property to indemnify parties to the proceeding.

[709] The ULCC commentary notes, however, that jurisdictions should consider whether some or all of this particular section is necessary, or if it is already covered in the jurisdiction's court rules.

[710] While the *Rules of Court* provide wide discretion for a Court to order costs, it may be useful to include section 86 to put people on notice that trust property can be used to pay costs of court applications and proceedings and, particularly, that a court may order costs to be drawn from all or part of the property.[150]

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[150] *Alberta Rules of Court*, Alta Reg 124/2010.

CHAPTER 18

General

A. Entitlement to Income Arising from Contingent Interest

[711] Uniform Act section 94 provides that a beneficiary with a contingent interest in trust property is entitled to income from the property before the interest vests, subject to any other person's interest in the income.

[712] *Trustee Act* sections 32 and 35 deal with a beneficiary's entitlement to income from trust property. *Trustee Act* section 32 states that a disposition which creates a vested or contingent property interest includes the income from that property, unless the income is otherwise expressly disposed of.[151]

[713] *Trustee Act* sections 35(1)-(2) provide that accumulations of income resulting from various property interests are to be held for beneficiaries who are entitled to the income until the proper time, otherwise the income accretes to the capital of the property from which it derives.[152] *Trustee Act* section 35(3) authorizes the trustee to treat accumulated income as income for purposes of making maintenance payments. In contrast to Uniform Act section 94, *Trustee Act* sections 32 and 35 do not give the beneficiary of a contingent property interest a right to the income earned on the property before the interest vests.

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[151] *Trustee Act* states

> **Income from dispositions**
>
> **32(1)** Any disposition of property, whether contingent or vested either defeasibly or indefeasibly, includes the income from that property except to the extent that the income, or any part of it, is otherwise expressly disposed of.
>
> **(2)** This section applies only to dispositions coming into force on and after January 1, 1975.

[152] *Trustee Act* states

> **Accumulations**
>
> **35(1)** The trustee shall accumulate the income by way of compound interest by investing it and the resulting income of it from time to time in authorized investments.
>
> **(2)** Subject to section 34 [Payment of Income], the trustee shall hold the accumulations as follows:
>
> (a) if the beneficiary is entitled to payment of the income when the beneficiary attains majority, for the beneficiary at that time;
>
> (b) if the beneficiary is entitled to payment of the income at a time subsequent to attaining majority, then for the beneficiary at that time;
>
> (c) if the beneficiary is the vested owner of the property from which the income comes, but the beneficiary's interest is subject to defeasance and the beneficiary dies prior to defeasance, whether or not the beneficiary's death causes the defeasance, for the beneficiary's personal representative as part of the beneficiary's estate;
>
> (d) in all other cases, as an accretion to the capital of the property from which the accumulations arose.
>
> **(3)** The trustee may at any time, if it appears expedient, pay or apply the whole or any part of the accumulations as if it were part of income for the purpose of section 34.

[714] The common law states that most contingent property interests are not entitled to the income generated prior to vesting. The ULCC comments indicate that Uniform Act section 94 is meant to change the common law. Further, according to the ULCC, income associated with contingent property interests accrues to the capital side of the trust. Section 94, on the other hand, establishes the interim right to income associated with a contingent property interest, subject to other interests. However, section 94 is not intended to alter the "executor's year" rule, which holds that interest on estate property does not start to accrue until one year after death or the grant of administration.

[715] Uniform Act section 94 is subject to a contrary intention being expressed in the trust instrument. Settlors who do not want trust beneficiaries to have a right to interim income derived from a contingent property interest can expressly override this statutory provision.

[716] The issue is whether the law should be changed to entitle a person with a contingent interest in trust property (that is, an equitable interest which will only vest in the person if the conditions precedent are met) to claim the income earned on the property before the interest vests in the person.

[717] One possible advantage of changing the law, as contemplated in Uniform Act section 94, is that it may make it easier for a person with a contingent interest to benefit from the trust. However, neither Uniform Act section 94 nor the ULCC commentary is clear on when the income may be paid to the contingent beneficiary. Is it payable as earned? Only as an advancement under section 43? Or only when the property vests? As a statutory change to the common law, section 94 will likely create more problems than it solves.

[718] The major risk of including Uniform Act section 94 in trustee legislation is that the conditions precedent to vesting may never come to pass. As a result, income may be distributed, in accordance with section 94, to the wrong person. For example, a contingent interest in trust property is created when a settlor states that property is held on trust for her grandson until he reaches the age of 18 but, if he dies before that age, then the property goes to Sam. The client really does not want the property to go to Sam at all, except as a last resort. Consistent with the settlor's intent, under the current law, Sam is not entitled to and does not get anything unless the settlor's grandson dies before he attains the age of 18. However, under Uniform Act section 94, Sam may be entitled to income earned whiles the settlor's grandson is still under the age of 18. Including Uniform Act section 94 in trustee legislation without clarifying when the income is payable

would overturn the usual intent and expectation that a beneficiary with a contingent interest in trust property will get nothing until the interest vests.

[719] Another issue with Uniform Act section 94 is that the income generated may not be subject to trustee discretion. For example, under Uniform Act section 43, payment of income derived from trust property may be used for the maintenance, education, benefit or advancement of a beneficiary. As it is currently worded, a contingent beneficiary's entitlement to income under Uniform Act section 94 does not appear to be limited in this way.

[720] Including Uniform Act section 94 in trustee legislation would complicate the drafting of trust instruments because it represents a highly uncertain change to the common law. Lawyers may not think to draft terms to override statutory provisions in order to reassert the common law and common expectations. In cases where a contingent beneficiary may need to access income from the property before vesting, Uniform Act section 43 offers an appropriate mechanism.

RECOMMENDATION 73

The new Act should not change the law to give a beneficiary with a contingent interest in trust property an entitlement to the income derived from the property before the interest vests.

B. Assumptions if Notice of Trust

[721] *Trustee Act* section 7 provides that a trustee must ensure, as far as possible, that records demonstrating the trustee's ownership of securities also indicate the trust relationship; however, this requirement does not apply if the trustee is a trust corporation or the Teachers' Pension Plans Board of Trustees.[153]

[722] Uniform Act section 95 reflects the concept that a person who receives non-specific notice of a trust relationship can assume that a trustee is acting with authority concerning the trust property. Section 95(1) states that the section applies to a person who receives notice of the existence of a trust by reason only

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[153] *Trustee Act* states:

> **Recording of trust status**
>
> **7(1)** A trustee must ensure, so far as it is practicable to do so, that any record evidencing the trustee's ownership of securities also indicates the trust relationship.
>
> **(2)** Subsection (1) does not apply when the trustee is a trust corporation or the Teachers' Pension Plans Board of Trustees.

of the production or registration of a document evidencing an appointment of a trustee, a trustee ceasing to hold office, or a vesting of property in a trustee. Section 95(2) then provides that a person who receives notice under section 95(1) may assume without inquiry that:

- A former trustee possessed the powers the former trustee exercised or purported to exercise over the trust property; and
- A current trustee has the powers the current trustee has exercised or purports to exercise over the trust property.

[723] The *Trustee Act* contains only minimal requirements that a trustee give general notice of a trust relationship to others in the context of securities which are held as trust property. The Uniform Act takes a different approach and incorporates the presumption that a trustee of property which is generally identified as trust property has, or had, authority concerning the administration or distribution of such property.

[724] The issue is whether it is necessary or desirable to include in trustee legislation a presumption that a trustee has, and acts in accordance with, authority in regards to trust property.

[725] The ULCC comments on Uniform Act section 95 indicate that third parties should be able to assume, on the basis of a general indication of a trust relationship, and without additional evidence or inquiry, that a trustee is authorized to deal with trust property. Further, according to the ULCC, third parties "should not be prejudiced by an improper exercise of trustee powers" unless there is evidence that would raise doubts in a reasonable mind as to a trustee's authority or the appropriateness of a transaction involving trust property.

[726] Uniform Act section 95 is a sensible addition to trustee legislation.

C. Purchaser Takes Property Subject to Trust if Notice of Defect

[727] Uniform Act section 96(1) provides that, for the purposes of section 96, purchaser is defined as a purchaser for value, a secured party, or any other person who for value has received an interest in or a claim on trust property. Uniform Act section 96(2) provides that a purchaser of trust property takes the property subject to the terms of the trust if the purchaser, at the time of the purchase, has received notice that:

- A former trustee did not possess, or a current trustee does not possess, a power purported to be exercised with respect to the trust property; or
- A former trustee or current trustee has acted in breach of trust with respect to the trust property.

[728] The ULCC comments on Uniform Act section 96 note that it is intended to express the principle that "it is equitable that the title of a third party who is aware when purchasing trust property that it is transferred in breach of trust should remain encumbered by the interest of the beneficiary."

[729] The ULCC notes that section 96 is not intended to change the common law. Indeed, Waters notes the following about tracing trust property:[154]

> The starting point is that trust property remains trust property, unless the recipient positively establishes the defence that he acquired a legal interest in the property, in good faith, for value, without notice of the breach of trust or other want of authority on the part of the trustee.

[730] Where the trust property is real property under the *Land Titles Act*, that Act should prevail. The *Land Titles Act* section 47 precludes the existence of a trust being recorded on the certificate of title.[155] There are narrow exceptions in section 116 for transmission on death. Generally speaking, however, the certificate of title will show the trustee as the absolute and beneficial owner of the property.

[731] While it may be equitable that a purchaser for value of trust property take the property subject to any defaults of which he or she may have been aware, a fundamental principle of the *Land Titles Act* is that purchasers are entitled to rely on the certificate of title. With only limited exceptions, the *Land Titles Act* will protect the title of a bona fide purchaser for value. The purchaser need not look behind the register and investigate the historical chain of title. Similarly, the

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[154] Waters at 1334 [footnote omitted].

[155] *Land Titles Act states*:

> **Registration of trusts**
>
> **47** No memorandum or entry shall be made, on a certificate of title, of any notice of trusts, whether expressed, implied or constructive, but the Registrar shall treat any instrument containing any such notice as if there were no trust, and the trustee or trustees named in the instrument are deemed to be the absolute and beneficial owners of the land for the purposes of this Act.

General Revenue Fund will not be liable to compensate for loss due to an owner's breach of trust.[156]

[732] With respect to transfers of real property mere knowledge that a trustee may not have had sufficient powers regarding the property will not invalidate the purchase or reduce the purchaser's interest. The purchaser's title or interest is only at risk in the case of fraud.[157]

[733] While the ULCC commentary indicates that Uniform Act section 96 is not intended to change the common law, it should also respect the integrity of the Alberta land titles system. To avoid doubt, Uniform Act section 96(2) should clearly state that it is subject to the *Land Titles Act*.

RECOMMENDATION 74

The new Act should include a provision that purchasers take property subject to a trust if the purchaser has notice of trust; however, this provision must be made subject to the *Land Titles Act*.

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[156] *Land Titles Act*, s 181 states:

> **Liability of General Revenue Fund**
>
> **181** The General Revenue Fund is not under any circumstances liable for compensation for loss, damage or deprivation
>
> (a) occasioned by the owner's breach of any trust whether express, implied or constructive,

[157] *Land Titles Act*, s 203 states:

> **Protection of person accepting transfer, etc.**
>
> **203(1)** In this section,
>
> (a) "interest" includes any estate or interest in land;
>
> (b) "owner" means
>
> (i) the owner of an interest in whose name a certificate of title has been granted,
>
> (ii) the owner of any other registered interest in whose name the interest is registered, or
>
> (iii) the caveator or transferee of a caveat in whose name the caveat is registered.
>
> **(2)** A person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not, except in the case of fraud by that person,
>
> (a) bound or concerned, for the purpose of obtaining priority over a trust or other interest that is not registered by instrument or caveat, to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest or to see to the application of the purchase money or any part of the money, or
>
> (a) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by instrument or caveat, any rule of law or equity to the contrary notwithstanding.
>
> **(3)** The knowledge of the person that any trust or interest that is not registered by instrument or caveat is in existence shall not of itself be imputed as fraud.
>
> **(4)** This section is deemed to have been in force since the commencement of *The Land Titles Act*, SA 1906 c24, in place of section 135 of that Act and similar sections in successor Acts.

D. Person Not Liable if Compliant with Act or Order

[734] The Uniform Act section 97 provides that subject to the Act, persons who comply with provisions of the Act or an order made pursuant to the Act will not be liable for a loss arising from anything done or permitted to be done under the Act unless that person acts in bad faith.

[735] This section appears to be an appropriate and sensible addition to trustee legislation.

E. Receipt Relieves Person from Further Obligation

[736] Uniform Act section 98 provides that a receipt given by a trustee for money or property received by the trustee relieves the person paying or otherwise transferring the property from any further obligation relating to the money or other property. Thus, the person who receives the receipt need not ensure the money or property is used properly and is not liable for any misuse by the trustee.

[737] *Trustee Act* section 27 similarly provides that a receipt from a trustee relieves a person from further obligation. [158] Uniform Act section 98 contains clearer language, and given the general recommendation to adopt the Uniform Act, should be included instead of *Trustee Act* section 27.

F. Representation by Committee

[738] The Uniform Act section 99 provides for the representation of beneficiaries by a committee. Under section 99(1), if a beneficiary is an "incapacitated person" for whom a guardian-type party has been appointed (depending on the term used in the enacting jurisdiction), the guardian, committee, or trustee is the representative of that beneficiary for the purposes of the Act.

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[158] *Trustee Act* states:

> **Power of trustees to give receipts**
>
> 27 The receipt in writing of any trustee for any money, securities or other personal property or effects payable, transferable or deliverable to the trustee under any trust or power is a sufficient discharge for it and effectually exonerates the person paying, transferring or delivering it from seeing to the application or being answerable for any loss or misapplication of it.

[739] As noted in Chapter 3, ALRI recommends the use of the more modern term "represented adult," instead of "incapacitated person", as an appropriate fit with existing Alberta legislation. Using the language from the appropriate Alberta legislation, the *Adult Guardianship and Trusteeship Act*, the guardian-type terms used would be guardian and trustee.

[740] Without limiting section 99(1), the following processes are given as examples of steps validly taken, given by, or received by, the guardian or trustee on behalf of a beneficiary:

- Any action required or permitted to be taken by the beneficiary;
- Any notice or report required or permitted to be given to the beneficiary; and
- Any consent or agreement required or permitted to be given by the beneficiary.

[741] Finally, Uniform Act section 99(3) confirms that notices or reports under the Act that are required or permitted to be given to a minor beneficiary are to be given to the guardian of the minor beneficiary's estate.

[742] The Uniform Act section 99 is a sensible provision that will assist trustees in determining who they should be dealing with in situations involving represented adults.

G. Agent of Beneficiary

[743] Uniform Act section 100 provides that a trust beneficiary may be represented by an agent for purposes of the Act.

[744] The issue is whether it is necessary or desirable that trustee legislation enable a trustee to deal with a beneficiary's agent.

[745] The ULCC notes that the provision is included to clarify that beneficiaries may use agents and that trustees may validly deal with these agents.

[746] Uniform Act section 100 reflects the common law of agency and there would be no obvious harm from including it in trustee legislation.

[747] As a general matter, it is considered good trust practice for a trustee to proceed cautiously to ensure that a beneficiary's agent has the appropriate

authority before interacting with the agent. Including Uniform Act section 100 in trustee legislation would not change that practice.

H. Notice – Qualified Beneficiary

[748] As noted in Chapter 2, the Uniform Act incorporates the concept of a qualified beneficiary. Recommendation 8 provides that trustee legislation should include the Uniform Act definition of qualified beneficiary, as well as section 101 respecting notice to qualified beneficiaries, as these sections clarify a trustee's responsibility to communicate with beneficiaries.

[749] Chapter 2 includes an extensive discussion of the definition of qualified beneficiary and the notice provisions in Uniform Act section 101. Section 101 has been incorporated into the definition of qualified beneficiary, which can be found in Chapter 3.

I. Delivery of Documents

[750] The Uniform Act section 102 notes that each jurisdiction may enact appropriate provisions to deal with the delivery of documents. The Act also includes various sections that require the provision of notice.

[751] ALRI recommends including a provision similar to the *Surrogate Rules* section 60(1), tailored for delivery of notice and documents instead of service.[159]

Deadline for comments on the issues raised in this document is March 31, 2016

Please respond to the online surveys at
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[159] *Surrogate Rules* state:

> **Service**
>
> **60(1)** Service may be made on a person
>
> (a) personally or by recorded mail in the case of a commencement document;
>
> (b) by ordinary mail delivery or electronic transmission in the case of documents other than commencement documents;
>
> (c) if documents filed in the matter give an address for service, at that address, or
>
> (d) by serving a lawyer who is authorized to accept service on behalf of a person.

APPENDIX

Sample Draft Act

Part 1 — Definitions and Application

Definitions

1 In this Act:

"alter ego trust" has the same meaning as in the *Income Tax Act* (Canada);

"court", except in reference to a court of competent jurisdiction, means the Court of Queen's Bench;

"fiscal period", in relation to a trust, means the following:

(a) the period identified in the trust instrument as the period adopted for accounting purposes;

(b) if clause (a) does not apply, the period specified by the trustee as the period adopted for accounting purposes;

(c) if clauses (a) and (b) do not apply, the calendar year.

"joint spousal or common-law partner trust" has the same meaning as in the *Income Tax Act* (Canada);

"objects", in relation to the objects of a trust, means beneficiaries or purposes;

"post-1971 spousal or common-law partner trust" has the same meaning as in the *Income Tax Act* (Canada);

"pre-1972 spousal trust" has the same meaning as in the *Income Tax Act* (Canada);

"qualified beneficiary", in relation to a trust, means a beneficiary who

(a) has a vested beneficial interest in the trust property, or

(b) has delivered written notice to a trustee that the beneficiary wants to be a qualified beneficiary and has not delivered a written withdrawal of notice;

"represented adult" means

(a) a represented adult under the *Adult Guardianship and Trusteeship Act*, or

(b) an incapacitated person under the *Public Trustee Act*.

"secured party" means a person who has a security interest;

"security interest" means an interest in property that secures payment or performance of an obligation;

"settlor", in relation to a trust created by a will, includes a testator;

"transfer", in relation to property, means to transfer by any method, including

(a) to assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest or release, or

(b) to agree to do any of the things referred to in clause (a);

"trust instrument" means any of the following that create or vary a trust:

(a) a deed, will or other legal instrument;

(b) an enactment, other than this Act;

(c) an oral declaration,

but does not include a judgment or an order of a court of competent jurisdiction;

"vest" includes to vest by means of any of the following:

(a) an order of a court of competent jurisdiction;

(b) the terms of a trust instrument or other legal instrument;

(c) the operation of section 25.

Commentary

The definitions are based on Uniform Act section 1 with minor adjustments.

Application to existing trusts

2 Unless otherwise provided in this Act, this Act applies in respect of a trust created before, on or after the date this section comes into force.

Commentary

This provision is based on Uniform Act section 2.

The following provisions of this Act set out exceptions to section 2:

- section 41 [*apportionment of outgoings between income and capital*];
- section 43 [*total return investment*];
- section 45 [*application of distributive powers to specified trusts*];
- section 59 [*trustees may act by majority*];
- section 63 [*allocation of insurance proceeds*];
- section 68 [*application to estates*];
- section 78 [*power of court to vary charitable gifts and charitable trusts*];

Trust instrument prevails

3 Unless otherwise provided in this Act, the provisions of a trust instrument prevail over any contrary provision of this Act.

Commentary

This provision is based on Uniform Act section 2.

The following provisions of this Act set out exceptions to section 3:

- section 15 [*court appointment of replacement or additional trustee*];
- section 18 [*resignation by trustee*];
- section 21 [*power of court to remove trustee*];
- section 22 [*power of court to reinstate trustee*];
- section 24 [*joint tenants*];
- section 25 [*vesting*];
- section 31 [*power of court to confer further powers on trustee*];
- section 63 [*allocation of insurance proceeds*];
- section 66 [*arrangement requires court approval*];
- section 69 [*compensation of trustee*];
- section 74 [*power of court to vary charitable gifts and charitable trusts*];
- section 75 [*power to order sale of property – charitable trust*];
- section 81 [*trustee may apply to court for directions*];
- section 82 [*trustee may apply to court for order respecting distribution of trust property*];
- section 83 [*trustee may be relieved of liability for breach of trust*];
- section 86 [*payment into court*];
- section 88 [*assumptions if notice of trust*];
- section 89 [*purchaser takes property subject to trust if notice of defect*];
- section 90 [*person not liable if compliant with Act or order*].

Application to trusts arising outside of this Act

4 This Act does not apply in respect of the following trusts:

(a) an implied trust;

(b) a resulting trust;

(c) a constructive trust;

(d) any other trust that arises by operation of law;

(e) a trust that arises by operation of an enactment other than this Act, except as provided in that enactment.

Commentary

This provision is based on Uniform Act section 2 with one key change. The new Act will not apply to trusts that arise by enactment other than this Act. If provisions of the new Act are appropriate to apply to trusts that arise under another enactment then that enactment should provide for the application of the new Act to those trusts.

Personal representatives

5 If a person is both a personal representative and a trustee with respect to all or part of the same estate, this Act does not apply in respect of a matter relating to the person in his or her capacity as personal representative and this Act does apply in respect of a matter relating to the person in his or her capacity as trustee.

Commentary

This provision is based on Uniform Act section 2. In keeping with the drafting approach set out in section 4 of this Act, the *Estate Administration Act* should be amended to clarify which provisions of this Act apply to personal representatives and in which capacity. Section 5 is included here to highlight the application to personal representatives pending such amendments. See also Part 6 of this Act.

Second party in possession

6 This Act does not apply to a secured party in possession of the subject matter of the security interest.

Commentary

This provision is based on Uniform Act section 2.

Continuation of existing rules

7 The rules of common law and equity, except insofar as they are inconsistent with the provisions of this Act, continue to apply.

Commentary

This provision is based on Uniform Act section 3.

Trust is not a person

8 For greater certainty, nothing in this Act makes a trust a person.

> Commentary
>
> This provision is based on Uniform Act section 4.

Part 2 — Appointment and Removal of Trustee

Division 1 — Appointment of Trustee

Designated person

9(1) In this Division, designated person, in relation to a trust, means the person determined under subsection (2) or (3).

(2) For a trust with a sole trustee, the designated person is the first of the following persons or classes of person, proceeding in descending order, who is able and willing to act as a designated person:

(a) the person nominated by the trust instrument for the purpose of appointing a replacement trustee;

(b) the person appointed in writing by the sole trustee to be a replacement trustee after the sole trustee's death;

(c) the personal representative of the sole trustee;

(d) the [appropriate government office].

(3) For a trust with more than one trustee, the designated person is the first of the following persons or classes of person, proceeding in descending order, who is able and willing to act as a designated person:

(a) the person nominated by the trust instrument for the purpose of appointing a replacement trustee;

(b) the continuing trustees, except a continuing trustee who has been appointed as a temporary trustee under section 11;

(c) the person appointed in writing by the last remaining trustee to be a replacement trustee after the last remaining trustee's death;

(d) the personal representative of the last remaining trustee;

(e) the [appropriate government office].

(4) If more than one person is nominated by a trust instrument or designated by this Act for the purpose of appointing a replacement trustee, the nominated persons or designated persons may act by majority.

(5) The persons referred to in subsection (4) are not able to act if a majority of them cannot agree on the appointment of a replacement trustee.

(6) A designated person, other than a temporary trustee,

(a) may appoint himself or herself as a replacement trustee, and

(b) may be appointed as a replacement trustee.

Commentary

This provision is based on Uniform Act sections 5, 6 and 7 with the following key changes:

- Replacement trustee is used in place of substitute trustee.
- For the purposes of determining who has the authority to appoint a replacement trustee, trusts have been divided into those with a sole trustee and those with more than one trustee.
- If there is more than one member in a class of designated persons, the designated persons in that class may act by majority.
- The provision allowing a beneficiary of a statutory trust to appoint a replacement trustee should not be included.

Person not qualified to be appointed trustee

10 A person is not qualified to be appointed as a trustee if any of the following apply to the person:

(a) the person is a represented adult;

(b) the person has been convicted of an offence involving dishonest conduct under an enactment or a law of Canada or any province or territory of Canada;

(c) the person is an undischarged bankrupt;

(d) the person is a corporation that is in liquidation or otherwise disqualified.

Commentary

This provision is based on Uniform Act section 10.

Appointment of temporary trustee

11(1) This section applies if a trustee is temporarily unable to participate in the administration of the trust by reason of an absence or a disability that does not result in the trustee being disqualified to hold office under section 19.

(2) The trustee may appoint another person as a temporary trustee for a specified period to exercise any or all powers, including distributive powers, and to perform any or all duties vested in the trustee, either alone or jointly with others.

(3) If a trustee is temporarily unable to act as a trustee and has not appointed a temporary trustee within a reasonable period or is unable to make an appointment, the designated person as defined in this Act may appoint a temporary trustee for a specified period.

(4) A trustee or designated person may appoint a co-trustee as a temporary trustee only if the appointment would be reasonable and prudent if the co-trustee were not a co-trustee and would be consistent with any express term of the trust instrument requiring a minimum number of trustees.

(5) An absent or disabled trustee must not administer the trust, exercise trustee powers or perform trustee duties during the period that a temporary trustee is appointed.

(6) A trustee or designated person who appoints a temporary trustee may revoke the appointment before the end of the specified period.

Commentary

Providing for a temporary trustee is based on Uniform Act sections 8 and 50 with the following changes:

- Temporary trustee is used in place of temporary substitute trustee.
- The new Act should not provide for the delegation of trust powers by power of attorney.
- A trustee should be able to delegate to another person, for a specified period of time, the authority to administer all or part of the trust or to exercise some or all of the trustee's powers, including distributive powers, or to perform some or all the trustee's duties.
- The new Act should specifically provide for the trustee to resume his or her role as trustee at the end of the specified period.

Notice of temporary trustee

12(1) A notice of appointment or revocation of appointment of a temporary trustee must be in writing and include the following:

(a) name of the absent or disabled trustee;

(b) name of the temporary trustee;

(c) contact information for the temporary trustee, including one or more of the following:

  (i) a mailing address;

  (ii) an electronic mailing address;

  (iii) a fax number;

(d) reason for the appointment of the temporary trustee;

(e) date or event on which the appointment of the temporary trustee takes effect; and

(f) date or event on which the appointment of the temporary trustee ends.

(2) A notice of appointment or revocation of appointment of a temporary trustee must be delivered within 15 days of the appointment or revocation to:

(a) all trustees;

(b) the qualified beneficiaries;

(c) if the appointment is made under 11(2), the designated person as defined in this Division; and

(d) if an appointment is made pursuant to section 11(3), the absent or disabled trustee.

(3) The failure by a trustee or designated person to provide notice does not in and of itself invalidate any act done or document executed by and between a third party and the temporary trustee.

Temporary trustee liability

13 A temporary trustee appointed under section 11 is a trustee for the purposes of this Act and may be liable for any loss to trust property arising from his or her acts or omissions when exercising trustee powers or performing trustee duties.

Appointment of replacement trustee

14 A designated person may appoint in writing a replacement trustee in any of the following circumstances:

(a) a person who was trustee is deceased or a person appointed as trustee dies before taking office;

(b) the trustee is a corporation that is dissolved;

(c) a person disclaims the office of trustee;

(d) a person ceases to hold the office of trustee under section 17.

Commentary

This provision is based on Uniform Act section 6 with the following key changes:

- Replacement trustee is used in place of substitute trustee.
- The provisions authorising a sole or last remaining trustee to appoint in writing a replacement trustee to take effect after their death have been moved to section 9 of this Act.

- The preference given to a person appointed as a replacement trustee by a sole or last remaining trustee has been moved to section 5 of this Act.

Court appointment of replacement or additional trustee

15 On application the court may appoint a replacement or additional trustee if

- (a) the court removes a trustee under section 21, or
- (b) the court is of the opinion that
  - (i) the appointment of a replacement or additional trustee is in the best interests of the objects of the trust, and
  - (ii) the appointment of a trustee would otherwise be inexpedient, difficult or impracticable.

(2) An application under this section may be brought by any of the following:

- (a) a trustee;
- (b) a beneficiary;
- (c) a secured party.

(3) This section prevails over any contrary provisions in a trust instrument.

Commentary:

This provision is based on Uniform Act section 9(1).

Powers and duties of new trustee

16 A replacement or additional trustee appointed in accordance with this Act has the same powers and duties and may in all respects act as if originally appointed as a trustee by the trust instrument.

Commentary

This provision is based on Uniform Act section 11.

Division 2 –Trustee Ceases to Hold Office

Ceasing to be trustee

17 A person ceases to hold the office of trustee in any of the following circumstances:

- (a) the person resigns the office under section 18;
- (b) the person ceases to be qualified to hold the office under section 19;

(c) the person is removed as a trustee under this Act or under a power conferred by a trust instrument;

(d) the person dies.

Commentary

This provision is based on Uniform Act section 12 with the clarification that a person ceases to be a trustee on death.

Resignation by trustee

18 A person resigning the office of trustee must

(a) give written notice of resignation to the first of the following persons or classes of person, proceeding in descending order with authority to appoint a replacement trustee

(i) the person nominated by the trust instrument for the purpose of appointing a replacement trustee;

(ii) the continuing trustees, if any;

(iii) the [appropriate government office]; and

(b) be able to provide proof that such notice was given.

(2) A person resigning the office of trustee must provide an accounting of trust property, as detailed in section 28 of this Act, to all qualified beneficiaries, and be able to prove that such accounting was provided.

(3) A person resigning the office of trustee may apply to the court for an order discharging the trustee.

(4) A trustee's resignation is effective when a replacement trustee is appointed or the court discharges the trustee, whichever comes first.

(5) This section prevails over any contrary provision in a trust instrument.

Commentary

This provision is based on Uniform Act section 13 with the following key changes:

- A trustee may resign without court involvement by providing:
    - written notice of resignation to the persons with authority to appoint a replacement trustee;
    - an accounting to beneficiaries;
    - proof that such notice and accounting were provided.
- The new Act should retain the option for a trustee to apply to the court to be discharged.

- A trustee's resignation is effective when a replacement trustee is appointed or the court discharges the trustee, whichever comes first.

Disqualification of trustee

19(1) A person ceases to be qualified to hold the office of trustee if any of the following apply to the person:

(a) the person is a represented adult;

(b) the person has been convicted of an offence involving dishonest conduct under an enactment or a law of Canada or any province or territory of Canada;

(c) the person is an undischarged bankrupt;

(d) the person is a corporation that is in liquidation or otherwise disqualified.

(2) On application the court may make an order disqualifying a trustee and establishing the date on which the disqualification takes effect.

(3) An application under this section may be brought by any of the following:

(a) a trustee;

(b) a beneficiary; or

(c) the [appropriate government office].

Commentary

This provision is based on Uniform Act section 14 with one key change:

- The new Act should retain the provision that the court may, on application, determine that a trustee is disqualified and establish the date on which such disqualification takes effect.

Removal by other trustees

20(1) A person can be removed as a trustee if

(a) the person

(i) fails to demonstrate the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person;

(ii) consistently fails to respond to communications from a beneficiary or another trustee; or

(iii) is otherwise unwilling or unable, or unreasonably refuses to act cooperatively with other trustees; and

(b) the person's conduct is detrimental to the efficient or proper administration of the trust.

(2) If there are 3 or more trustees, a trustee may be removed under subsection (1) if a majority of the other trustees provide a written resolution setting out the reasons for the removal.

(3) A resolution under subsection (2) is effective,

(a) if the trustee that is the subject of the written resolution does not request a meeting under subsection (4), 15 days after a copy of the written resolution is delivered to that trustee, or

(b) if the trustee that is the subject of the written resolution requests a meeting under subsection (4), at the conclusion of the meeting, unless the written resolution is rescinded.

(4) Within the 15-day period after a copy of the written resolution is delivered to the trustee that is the subject of the written resolution, that trustee, by delivering a written request to another trustee, may request a meeting with the other trustees to respond to the reasons set out in the written resolution.

(5) A meeting requested under subsection (4) must take place as soon as practicable.

(6) After the trustee responds to the reasons set out in the resolution, the other trustees may rescind the written resolution.

Commentary

This provision is based on Uniform Act section 15.

Power of court to remove trustee

21(1) On application the court may remove a person from the office of trustee if

(a) the person could be removed under section 20 but there are fewer than 3 trustees, or

(b) the court is of the opinion that

(i) the removal of the person is in the best interests of the objects of the trust; and

(ii) the removal of the person under section 20 or under a power conferred by a trust instrument would be inexpedient, difficult or impracticable; or

(c) the trustee has refused or failed to perform or exercise duties or powers under section 80.

(2) If the court considers a reduction in the number of trustees to be in the best interests of the objects of a trust, the court may

(a) reduce the number of trustees; and

(b) to give effect to the decision under clause (a), remove a person as trustee.

(3) An application under this section may be brought by any of the following:

(a) a trustee;

(b) beneficiary;

(c) a secured party.

(4) This section prevails over any contrary provisions in a trust instrument.

Commentary

This provision is based on Uniform Act section 16.

Power of court to reinstate trustee

22(1) A person removed as trustee, except a person removed under sections 21 or 80, may apply to the court for an order under subsection (3) of this section,

(a) in the case of a person removed as trustee under section 20, within 2 months after the date the written resolution becomes effective, or

(b) in any other case, within 2 months after the earlier of

  (i) the date of the appointment of a replacement trustee under section 14; and

  (ii) the date that the removal as trustee comes to the attention of the person removed.

(2) On an application under subsection (1), the court may make an order under subsection (3) if

(a) the court is satisfied that the person was removed as trustee based on a mistake of fact or law; and

(b) the court considers making the order to be in the best interests of the objects of the trust.

(3) Subject to subsection (2), the court may

(a) reinstate the person as trustee on a specified date;

(b) declare that the person did not cease to hold the office of trustee during the period following the purported removal; or

(c) dismiss the application.

(4) If the court makes an order under subsection (3), the court may also give directions or make a declaration as to the person's status as trustee or the liability of

(a) a replacement trustee appointed under section 14;

(b) a person who is the subject of the order under subsection (3); or

(c) any other person who was a trustee after the person making the application was removed as trustee.

(5) This section prevails over any contrary provisions in a trust instrument.

Commentary

This provision is based on Uniform Act section 17.

Liability of former trustee

23 Unless the court orders otherwise, if a person ceases to be a trustee, any consequential vesting of trust property in or transfer of trust property to a replacement trustee does not relieve the former trustee from liability from a breach of trust occurring while that person was a trustee.

Commentary

This provision is based on Uniform Act section 19.

Part 3 — Vesting

Joint tenants

24(1) If trust property vests in more than one trustee, the trust property vests in the trustees as joint tenants.

(2) This section prevails over any contrary provisions in a trust instrument.

Commentary

This provision is based on Uniform Act section 20.

Vesting

25(1) If a person is appointed as a replacement, temporary or additional trustee of a trust, the trust property vests in that person at the time the appointment is effective.

(2) If a person ceases to be a trustee of a trust, the trust property ceases to be vested in that person and remains vested in each continuing trustee.

(3) If a person who is a sole trustee or the last remaining trustee of a trust ceases to be a trustee and a new trustee has not been appointed or there is otherwise no trustee of a trust, the trust property vests in the court until a new trustee is appointed.

(4) A vesting under this section has the same effect as if the property had been actually transferred to the person in whom or the court in which the property is vested.

(5) No further declaration or order is required in relation to trust property that vests or ceases to be vested under this section.

(6) Without limiting subsections (4) and (5), a person in whom the property vests under this section is entitled to perfect the transfer of the property in accordance with the *Land Titles Act* insofar as the *Land Titles Act* is applicable.

(7) This section applies whether a person ceases to be a trustee, or is appointed as a replacement or additional trustee, in accordance with the terms of the trust or this Act.

(8) This section prevails over any contrary provisions in a trust instrument.

Commentary

This provision is based on Uniform Act section 21.

Part 4 — Powers and Duties of Trustee

Division 1 — Duties of Trustee

Duty of care

26(1) In the administration of a trust, a trustee must act in good faith and in accordance with the following:

(a) the terms of the trust;

(b) the best interests of the objects of the trust;

(c) this Act.

(2) Subject to section 34, in the performance of a duty or the exercise of a power, whether the duty or power arises by operation of law or the trust instrument, a trustee must exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person.

(3) Despite subsection (2) but subject to section 34, if, because of a trustee's profession, occupation or business, the trustee possesses or ought to possess a particular degree of care, diligence and skill that is relevant to the administration of the trust and is greater than that which a person of ordinary prudence would exercise in dealing with the property of another person, the trustee must exercise that greater degree of care, diligence and skill in the administration of the trust.

Commentary

This provision is based on Uniform Act section 26.

Conflict of interest

27(1) A trustee must exercise the powers and perform the duties of the office of trustee solely in the interests of the objects of the trust.

(2) Without limiting subsection (1), a trustee must not knowingly permit a situation to arise

- (a) in which the trustee's personal interest conflicts in any way with the trustee's exercise of the powers or performance of the duties of the office of trustee; or
- (b) in which the trustee may derive any personal benefit or a benefit for any other person,

except so far as the law or the trust instrument expressly permits.

(3) On application by a trustee or qualified beneficiary who shows that an act or declining to act is in the best interests of the objects of the trust, whether or not the beneficiaries consent, the court may make an order, on terms and conditions the court considers appropriate,

- (a) allowing the trustee to act or decline to act, whether or not the trustee may be in a situation that contravenes subsection (1) or (2); or
- (b) excusing a trustee from liability for contravening subsection (1) or (2).

(4) An order under subsection (3)(b) may be made any time after the contravention of subsection (1) or (2).

(5) A trustee or qualified beneficiary must serve notice of an application under this section as follows:

- (a) on all qualified beneficiaries of the trust, unless otherwise ordered by the court;
- (b) if a beneficiary of the trust is a minor and has a vested beneficial interest, on the [appropriate government office] at least 1 month before the date set for the hearing of the application;
- (c) if the trust is a charitable trust, on the [appropriate government office] at least 1 month before the date set for the hearing of the application.

(6) On application by the trustee, a qualified beneficiary, or the [appropriate government office], the court may vary an order under this section if

- (a) additional information becomes available after the order is made; or
- (b) the circumstances under which the order was made change.

(7) Nothing in this section limits the jurisdiction of the court under sections 66, 67 or 83.

Commentary

This provision is based on Uniform Act section 27 with one key change:

- Qualified beneficiaries may bring applications under the section.

Duty to report to qualified beneficiaries

28(1) For each fiscal period of a trust, the trustee must deliver to the qualified beneficiaries a report in respect of the trust that includes the following:

(a) for the fiscal period in which the trust is created, a statement of the assets and liabilities of the trust and the value of those assets and liabilities at the time the trust is created;

(b) a statement of the assets and liabilities of the trust and the value of those assets and liabilities at the beginning and end of the fiscal period;

(c) the basis for the valuations of the assets of the trust, if the trustee considers it practicable;

(d) a statement of receipts and their sources for the fiscal period;

(e) a statement of disbursements and their recipients for the fiscal period.

(2) A report under subsection (1) in respect of a fiscal period must be delivered on or before the date that is 2 months after the end of the fiscal period.

(3) On the written request of a qualified beneficiary, the trustee must allow the beneficiary to inspect the source documents for the statements referred to in subsection (1).

(4) Subject to section 29 (2), a trustee is not required to disclose information under this section if, in the opinion of the trustee, the disclosure would

(a) be detrimental to the best interests of any beneficiary or otherwise be prejudicial to the trust property or the administration of the trust;

(b) conflict with any duty owed by a trustee as a director of a corporation in which the trust has an ownership interest;

(c) reveal the reasons why a trustee did or did not exercise a power conferred by the trust instrument or an enactment;

(d) place an unreasonable administrative burden on the trustee; or

(e) place the trustee in breach of obligation, properly assumed by the trustee, to maintain confidence.

(5) A qualified beneficiary may waive, by delivering written notice to the trustee, the right to a report or to specific information in the report that is required to be given under this section.

(6) A qualified beneficiary may revoke a waiver by delivering written notice to the trustee.

Commentary

This provision is based on Uniform Act sections 28.

Duty to provide information

29(1) Section 28 does not limit the duty under general trust law of a trustee to provide to a beneficiary, on request, accounts or trust information within a reasonable period of time.

(2) On application by a qualified beneficiary or a beneficiary who has requested information that has not been provided by the trustee, the court may order, on terms and conditions the court considers appropriate, the disclosure of any information regarding any of the following:

(a) the terms of the trust;

(b) the administration of the trust;

(c) the assets and liabilities of the trust.

Commentary

This provision is based on Uniform Act section 29.

Division 2 — General Administrative Powers

Powers of trustee

30(1) Subject to this Act and the trustee's fiduciary obligations, a trustee has the powers and capacity of an individual of full capacity in relation to trust property vested in the trustee as if the property were vested in the trustee absolutely and for the trustee's own use.

(2) Without limiting subsection (1), a trustee may do any of the following:

(a) sell or lease trust property;

(b) borrow money for the purpose of carrying out the trust;

(c) create a security interest in trust property.

(3) A trustee may do one or both of the following:

(a) with the consent of, and for the purpose of providing a residence for, a beneficiary, use the income or capital to which the beneficiary is entitled

(i) to purchase or rent living accommodation; or

(ii) to construct a residence on land that is part of the trust property or purchased for the construction;

(b) with the consent of a beneficiary, effect a distribution in kind of specific trust property in or towards satisfaction of the share or interest of the beneficiary.

> Commentary
>
> This provision is based on Uniform Act section 24.

Power of court to confer further powers on trustee

31(1) On application, if a transfer of trust property that is expedient and in the best interests of the objects of the trust cannot be carried out because the trustee lacks the power, the court may confer the necessary power on the trustee, either generally or in any particular instance and on terms and conditions the court considers appropriate.

(2) An application under subsection (1) may be brought by any of the following:

(a) a trustee;

(b) a beneficiary;

(c) a secured party;

(d) the [appropriate government office].

(3) This section prevails over any contrary provisions in a trust instrument.

> Commentary
>
> This provision is based on Uniform Act section 25.

Division 3 – Investment Power of Trustee

Power to invest

32(1) Subject to the provisions of the trust instrument, a trustee must invest trust funds prudently with a view to obtaining a reasonable return while avoiding undue risk, having regard to the circumstances of the trust.

(2) A trustee may invest trust property in any form of property in which a prudent investor might invest including a security issued by a mutual fund as defined in the *Securities Act*.

(3) A trustee must review the trust investments at reasonable intervals for the purpose of determining that the investments continue to be appropriate to the circumstances of the trust.

(4) Without restricting the matters that a trustee may consider, in planning the investment of trust funds a trustee must consider the following matters, insofar as they are relevant to the circumstances of the trust:

(a) the purposes and probable duration of the trust, the total value of the trust's assets and the needs and circumstances of the beneficiaries;

(b) the duty to act impartially towards beneficiaries and between different classes of beneficiaries;

(c) the special relationship or value of an asset to the purpose of the trust or to one or more of the beneficiaries;

(d) the need to maintain the real value of the capital or income of the trust;

(e) the need to maintain a balance that is appropriate to the circumstances of the trust between

  (i) risk,

  (ii) expected total return from income and the appreciation of capital,

  (iii) liquidity, and

  (iv) regularity of income;

(f) the importance of diversifying the investments to an extent that is appropriate to the circumstances of the trust;

(g) the role of different investments or courses of action in the trust portfolio;

(h) the costs, such as commissions and fees, of investment decisions or strategies;

(i) the expected tax consequences of investment decisions or strategies.

Commentary

This provision is based on *Trustee Act* sections 3(2), (3) and (5), and Uniform Act section 30

Investment powers of corporate trustee or agent

33(1) Without limiting section 32, a corporation that is a trustee may invest trust money in its own securities.

(2) Without limiting section 32, if the trustee is a trust corporation or the trustee's agent is a trust corporation as defined by the *Loan and Trust Corporations Act*, the trustee may invest trust property in a common trust fund managed by trust corporation.

Commentary

This provision is based on Uniform Act section 30 with one key change:

- A trustee may only invest trust property in a common trust fund managed by a trust corporation if the trust corporation is a trustee of the trust property or the trust corporation is the agent of a trustee of the trust property.

Standard of care in investing

34(1) In investing trust property, a trustee must exercise the care, diligence and skill that a prudent investor would exercise in making investments.

(2) Despite subsection (1), if, because of a trustee's profession, occupation or business, the trustee possesses or ought to possess a particular degree of care, diligence and skill that is relevant to the investment of trust property and is greater than that which a prudent investor would exercise in making investments, the trustee must exercise that greater degree of care, diligence and skill in investing trust property.

Commentary

This provision is based on Uniform Act section 31.

Trustee not liable if overall investment strategy prudent

35(1) A trustee is not liable for a loss in connection with the investment of trust funds that arises from a decision or course of action that a trustee exercising reasonable skill and prudence and complying with section 32 could reasonably have made or adopted.

(2) Despite subsection (1), a trustee is liable for a loss arising from the investment of trust property if

(a) the trustee is a trustee described in section 34(2); and

(b) the conduct of the trustee that led to the loss did not conform to a plan or strategy for the investment of the trust property that

(i) comprised reasonable assessments of risk and return; and

(ii) would be adopted under comparable circumstances by a trustee.

(3) A court assessing the damages payable by a trustee for a loss to the trust arising from the investment of trust funds may take into account the overall performance of the investments.

Commentary

This provision is based on *Trustee Act* sections 3 and 4 and Uniform Act section 32.

Abolition of common law rules – anti-netting rules

36(1) The rule of law that requires the assessment of a trustee's decisions on an investment-by-investment basis is abolished.

(2) The rule of law for the assessment of damages for breach of trust that prohibits losses from being offset by gains is abolished.

> Commentary
>
> This provision is based on Uniform Act section 33.

Interpretation of older trust instruments

37(1) If the trust instrument expresses the powers of the trustee as powers to invest trust property in investments permitted under a former *Trustee Act*, the trust instrument is to be interpreted as authorizing the investments permitted under this Division and section 52.

(2) Despite subsection (1), if an investment is expressly prohibited by the trust instrument, the trust instrument is not to be interpreted as authorizing the investment.

(3) Subsection (1) does not affect a power of the trustee to invest trust property in an investment expressly permitted by the trust instrument.

> Commentary
>
> This provision is based on Uniform Act section 34.

Division 4 — Allocation of Income and Capital by Trustee

Definition

38 In this Division, "outgoing" means an expenditure paid or incurred in administering a trust, including, without limitation, an expenditure arising from or made with respect to repairs, maintenance, insurance, taxes, security interests, debts, calls on shares, annuities and losses.

> Commentary
>
> This provision is based on Uniform Act section 35.

Duty to act impartially and prudently

39 Nothing in this Division affects the duty of a trustee

(a) to act impartially as between different classes of beneficiaries in the administration of a trust; or

(b) to comply with section 34 in relation to investments.

Commentary

These provisions are based on Uniform Act section 36.

Abolition of common law rules of apportionment

40(1) The first branch of the rule in *Howe v Lord Dartmouth*, which states that a trustee must convert wasting, hazardous or speculative assets to authorized trustee investments if a will contains a residuary gift of personal property or a future or reversionary property interest for persons in succession, is abolished.

(2) The second branch of the rule in *Howe v Lord Dartmouth*, which states that, if an estate's original assets other than authorized investments are to be converted under a trust for sale, a trustee must apportion the income from those assets between the income and capital beneficiaries until conversion takes place, is abolished.

(3) The rule in *Re Earl of Chesterfield's Trusts*, which states that, if future or reversionary property is included in a residuary gift under a will and is not yielding income before it is sold, the trustee must apportion the proceeds of sale, after it comes into possession, between the income and capital beneficiaries in a particular way, is abolished.

Commentary

This provision is based on Uniform Act section 37.

Apportionment of outgoings between income and capital

41(1) This section does not apply in respect of the following trusts unless the trust instrument expressly provides otherwise:

(a) an alter ego trust;

(b) a joint spousal or common-law partner trust;

(c) a post-1971 spousal or common-law partner trust;

(d) a pre-1972 spousal trust.

(2) A trustee may charge all or part of an outgoing to the income or capital of the trust as the trustee considers is

(a) just and equitable in the circumstances;

(b) in accordance with ordinary business practice; and

(c) in the best interests of the objects of the trust.

(3) If the amount of an outgoing charged under subsection (2) to the income or capital of the trust is not equal to the amount paid out of the income or capital in respect of the outgoing, a trustee may allocate an amount between income and capital to recover or reimburse the payment in respect of the outgoing.

(4) If trust property is subject to depreciation, a trustee may

(a) deduct from the income earned from the trust property an amount that the trustee considers is

(i) just and equitable in the circumstances;

(ii) in accordance with ordinary business practice; and

(iii) in the best interests of the objects of the trust; and

(b) add the amount deducted under clause (a) to the capital of the trust.

Commentary

This provision is based on Uniform Act section 38.

Discretionary allocation trusts of receipts and outgoings

42(1) If a trustee is expressly directed by the trust instrument to hold trust property on discretionary allocation trusts, the trustee may allocate receipts and charge outgoings to the income and capital of the trust as the trustee considers is just and equitable in the circumstances.

(2) If the amount of an outgoing charged under subsection (1) to the income or capital of the trust is not equal to the amount paid out of the income or capital in respect of the outgoing, a trustee may allocate an amount between income and capital to recover or reimburse the payment in respect of the outgoing.

Commentary

This provision is based on Uniform Act section 39.

Total return investment

43(1) In this section:

"assets" means

(a) trust property that is subject to a total return investment policy; or

(b) property that is an endowment or similar gift to a non-profit organization and that is subject to a total return investment policy under subsection (4);

"fiscal period", in relation to a gift, means

(a) the period identified in the terms of the gift as the period adopted for accounting purposes;

(b) if clause (a) does not apply, the period specified by the trustee as the period adopted for accounting purpose; or

(c) if clauses (a) and (b) do not apply, the calendar year;

"net value of the assets" means the amount equal to the fair market value of the assets less any liabilities in relation to those assets.

"specified percentage" means

(a) a percentage specified in the trust instrument or the terms of the gift for the purpose of this section; or

(b) if no percentage is specified in the trust instrument or the terms of the gift, the percentage specified by regulation;

"total return investment policy" means a policy of investing property so as to obtain the optimal return without regard to whether the return is characterized as income or capital;

"trustee" includes the directors of a non-profit organization who have adopted a total return investment policy under subsection (4);

"valuation period" means the valuation period determined under subsection (9) or varied by regulation.

(2) For the purposes of this section, in a trust instrument or the terms of a gift, the following words constitute a reference to a total return investment policy:

(a) "on percentage trusts";

(b) "total return", when used with reference to investments.

(3) A settlor may direct, in a trust instrument, the trustee to adopt a total return investment policy with respect to all or part of the trust property.

(4) Subject to subsection (5), the trustee of a charitable trust, with respect to trust property, and the directors of a non-profit organization, with respect to property that is an endowment or similar gift to the organization, may adopt a total return investment policy with respect to that property, whether or not the terms of the trust or gift contain a direction to that effect.

(5) A total return investment policy may not be adopted under subsection (4) if in the trust instrument the settlor expressly directs the trustee not to adopt a total return investment policy with respect to that trust property.

(6) If a total return investment policy is adopted, the trustee must determine the net value of the assets at the beginning of each valuation period.

(7) If a total return investment policy is adopted, the trustee must, in each fiscal period,

(a) pay to the persons who would otherwise be the income beneficiaries; or

(b) apply to the other objects

an amount equal to the specified percentage of the net value of the assets at the beginning of the valuation period.

(8) The trustee must do the following:

(a) pay or apply an amount under subsection (7) from income earned during the fiscal period from the investment of the assets;

(b) if the income referred to in clause (a) of this subsection is insufficient to pay or apply the amount required under subsection (7), pay or apply an amount from capital;

(c) if the income earned during the fiscal period from the investment of the assets exceeds the amount paid or applied under subsection (7), add the amount of the excess to the assets.

(9) The valuation period for assets that are invested in accordance with a total return investment policy is determined as follows:

(a) the first valuation period begins

  (i) one year after the date of the testator's death, in the case of a testamentary trust or gift made in a will; or

  (ii) on the date of the settlement or the receipt of the gift;

(b) the second and subsequent valuation periods begin immediately after the end of the previous valuation period;

(c) a valuation period is the shortest of the following:

  (i) subject to a period specified by regulation, 3 years;

  (ii) the period specified in the trust instrument;

  (iii) the period selected by the trustee.

(10) This section applies in respect of an endowment or similar gift given before, on or after the date this section comes into force

Commentary

This provision is based on Uniform Act section 40.

Application of sections 42 and 43

44 Sections 42 and 43 do not limit any other power of a trustee to encroach on capital in favour of a beneficiary.

Commentary

This provision is based on Uniform Act section 41.

Division 5 — Distributive Powers of Trustee

Interpretation and application

45(1) This Division does not apply in respect of the following trusts unless the trust instrument expressly provides otherwise:

(a) an alter ego trust;

(b) a joint spousal or common-law partner trust;

(c) a post-1971 spousal or common-law partner trust;

(d) a pre-1972 spousal trust.

(2) A direction in a provision of a trust instrument to accumulate income is not in itself evidence of a contrary intention sufficient to have the provision of the trust instrument prevail over a provision in this Division.

Commentary

This provision is based on Uniform Act sections 42(2) and (3).

Power to pay income to or for benefit of individual

46(1) Subject to any interest or charge affecting the trust property, if property is held by a trustee in trust for an individual the trustee may do any of the following as the trustee considers reasonable in the circumstances:

(a) if the individual is a minor, pay all or part of the income earned from the property towards the individual's past, present or future maintenance, education, benefit or advancement in life;

(b) if the individual has reached the age of majority and does not have an income or capital interest vested in interest and in possession, pay to, or for the maintenance, education, benefit or advancement in life of, the individual all or part of the income earned from the property.

(2) A trustee may pay the income earned from the trust property under subsection (1) whether the interest of the individual in the trust property is vested or contingent.

Commentary

This provision is based on Uniform Act section 43 with the following key changes:

- The trustee should not have authority to make payments of income to a beneficiary's child, spouse or former spouse.
- No matter the age of the beneficiary, the trustee may make payments of income for a beneficiary's maintenance, education, benefit or advancement in life.

Power to pay amount from capital for benefit of individual

47(1) If property is held by a trustee in trust for an individual for any interest in capital, subject to this section and to any interest or charge affecting the trust property, the trustee may pay an amount in respect of the individual towards the following from the capital of the trust, as the trustee considers reasonable in the circumstances:

(a) if the individual is a minor, towards the individual's past, present or future maintenance, education, benefit or advancement in life;

(b) if the individual has reached the age of majority, towards the individual's maintenance, education, benefit or advancement in life.

(2) In order to pay an amount under subsection (1), the trustee may

(a) create a security interest in a capital asset of the trust; or

(b) otherwise transfer a capital asset of the trust.

(3) A trustee may pay an amount under subsection (1) or exercise the power under subsection (2) whether the interest of the individual in the capital

(a) is vested or contingent; or

(b) is in possession or in remainder or reversion.

(4) A trustee may pay an amount under subsection (1)

(a) to an individual with a vested interest in the capital, with or without court approval; and

(b) to an individual with a contingent interest in the capital, with court approval.

(5) If the court approves an amount under subsection (4)(b) in respect of an individual and a trustee pays an amount under subsection (1) in respect of the individual, the trustee must promptly give written notice of the following to any other beneficiary who, at the time of the payment of the amount, is entitled to receive income from the capital from which the amount was paid:

(a) the terms of the order made by the court under subsection (4)(b);

(b) the amount paid in accordance with the order.

(6) A trustee may not pay an amount under subsection (1)

(a) if the income or accumulated surplus income is available under the terms of the trust for the maintenance, education, benefit or advancement in life of the individual, unless the available income or accumulated surplus income is insufficient; or

(b) if the payment is detrimental to the pecuniary interest of a person who is entitled to a prior life or other interest, whether the interest is vested or contingent, in the amount to be paid, unless

  (i) the person is of full capacity and consents in writing to the payment; or

  (ii) the person is not of full capacity and the court approves the payment, on application by the trustee.

(7) If an amount is paid under subsection (1) in respect of an individual, the individual's interest in the capital of the trust must be reduced by that amount.

(8) If the individual referred to in subsection (7) does not have a vested interest in the capital of the trust when the amount is paid or applied under subsection (1), the reduction under subsection (7) is to be made when that interest is vested.

(9) This section has effect if and only as a contrary intention is not expressed in the trust instrument and has effect subject to the terms of that instrument and the provisions contained in it.

Commentary

This provision is based on Uniform Act section 44 with the following key changes:

- The trustee should not have authority to make payments from capital to a beneficiary's child, spouse or former spouse.
- No matter the age of the beneficiary, the trustee may make payments from capital for a beneficiary's maintenance, education, benefit or advancement in life.
- A trustee may exercise discretion to advance an amount from capital to a beneficiary with a vested interest without court approval.
- A trustee may only advance an amount from capital to a beneficiary with a contingent interest with court approval.
- The new Act should not adopt a percentage value or dollar value basis for making payments from capital without court approval.
- Section 44 only has effect if and so far as a contrary intention is not expressed in the trust instrument and has effect subject to the terms of that instrument and the provisions contained therein.

Conditions on payment from capital

48(1) If a trustee pays an amount under section 47(1) or, under the terms of the trust, pays an amount from capital for the benefit of an individual, the trustee may impose conditions on the person receiving the payment or the benefit of the payment, including, without limitation, conditions relating to the following:

(a) the repayment of the payment to the trustee;

(b) the payment of interest to the trustee;

(c) the giving of security to the trustee by the person receiving the payment.

(2) The trustee may do any of the following in relation to a condition imposed under subsection (1):

(a) waive all or part of a condition;

(b) release a person from an obligation undertaken;

(c) release the security given.

(3) If an amount paid under section 47(1) is repaid to or recovered by a trustee in accordance with a condition under subsection (1) of this section, the amount repaid or recovered is deemed not to have been paid under section 47.

(4) When imposing a condition in respect of security under subsection (1), a trustee is not bound by any restrictions on the investment of the trust property.

(5) A trustee who has acted in accordance with section 26 in paying an amount under section 47 is not liable for a loss arising from the transaction, including a loss arising because a person breaches a condition imposed by the trustee.

Commentary

This provision is based on Uniform Act section 45.

Payment or transfer in relation to minor or represented adult

49 If a minor or a represented adult is entitled to trust money or trust securities, a trustee may pay the money to or transfer the securities to

(a) the guardian of the minor or the committee of the represented adult, or

(b) the [appropriate government office] in trust for the minor or the represented adult if

  (i) there is no guardian of the minor or committee of the represented adult; or

  (ii) the trustee cannot locate the guardian of the minor or the committee of the represented adult after making diligent inquiries.

Commentary

This provision is based on Uniform Act section 46.

Division 6 — Delegation by Trustee

Appointment of agent and supervision

50(1) In appointing an agent, a trustee must

(a) personally select the agent;

(b) be satisfied of the agent's suitability to exercise the power or perform the duty for which the agent is to be appointed; and

(c) establish the terms of the delegated authority.

(2) A trustee must exercise reasonable and prudent supervision over an agent appointed by the trustee.

(3) A trustee may appoint a co-trustee as an agent only if the appointment would have been reasonable and prudent if the co-trustee had not been a co-trustee.

> Commentary
>
> This provision is based on Uniform Act sections 49(2), (3) and (6), and *Trustee Act* section 5(3).

When trustee may not delegate

51 A trustee may not appoint an agent to do any of the following:

(a) exercise a discretion to distribute or transfer trust property to, or for the benefit of, a beneficiary of the trust;

(b) perform the duties of the trustee in appointing and supervising an agent under section 50.

> Commentary
>
> This provision is based on Uniform Act section 47(3).

Delegation of investment authority

52(1) A trustee may delegate to an agent the degree of authority with respect to the investment of trust funds that a prudent investor might delegate in accordance with ordinary investment practice.

(2) Investment in a mutual fund referred to in section 32(2), a common trust fund referred to in section 33(2) or a similar pooled fund is not a delegation of authority with respect to the investment of trust property.

> Commentary
>
> This provision is based on Uniform Act section 48(4).

Delegation of administrative functions

53(1) If it is reasonable and prudent, a trustee may delegate to an agent the authority to carry out administrative functions related to the trust.

(2) Without limiting subsection (1), a trustee may appoint a person as agent to do one or more of the following:

(a) execute documents;

(b) transfer or acquire money or other property;

(c) give a receipt for any money or other property received by the trustee.

Commentary

This provision is based on Uniform Act sections 47(1) and (2).

Liability of trustee for agent

54 A trustee is liable for a loss in the value of the trust property caused by an act or omission of an agent only if the trustee is in breach of section 50 and the loss is a consequence of that breach.

Commentary

This provision is based on Uniform Act section 49(4).

Liability of agent

55 Where a trustee delegates to an agent and the trust suffers a loss because of the agent's breach of the terms of the agency contract, damages for the loss may be recovered from the agent in an action

(a) by the trustee; or

(b) by a beneficiary of the trust if the trustee fails to commence an action within a reasonable time after acquiring knowledge of the breach.

Commentary

This provision is based on *Trustee Act* section 5(5).

Sub-delegation by agent

56(1) An agent appointed by a trustee may delegate to a person a power or duty of the agent, subject to any restrictions relating to delegation established by the trustee.

(2) In delegating a power or duty under subsection (1), the agent must

(a) personally select the delegate; and

(b) be satisfied of the delegate's suitability to exercise the power or perform the duty delegated to the delegate.

(3) An agent must exercise reasonable and prudent supervision over a person to whom a power or duty is delegated under subsection (1).

> Commentary
>
> This provision is based on Uniform Act sections 49(7)-(9).

Division 7 – Miscellaneous Powers and Duties of Trustee

Liability of trustee

57(1) Subject to this Act, a trustee is not liable for a breach of trust committed by a co-trustee unless the trustee participated in the breach of trust by the trustee's own acts or omissions in relation to the trust property.

(2) Subject to sections 54 a trustee is not liable for a loss in relation to trust property only by reason that the trustee signs a receipt with a co-trustee because the trust instrument imposes a requirement that trustees act unanimously.

> Commentary
>
> This provision is based on Uniform Act section 51.

Powers conferred and duties imposed on trustees jointly

58(1) If a power is conferred or a duty is imposed on 2 or more trustees, the power is conferred and the duty is imposed jointly.

(2) If a power is conferred or a duty is imposed on 2 or more trustees jointly,

(a) the power may be exercised or the duty may be performed in accordance with section 59 or 60; and

(b) the power may be exercised or the duty may be performed by the survivor of them.

> Commentary
>
> This provision is based on Uniform Act section 52.

Trustees may act by majority

59(1) If there are more than 2 trustees, the trustees may perform their duties and exercise their powers by majority of the trustees holding office.

(2) A trustee who disagrees with a decision or act of the majority of trustees may deliver a written statement of disagreement to the other trustees, but, unless the decision or act is unlawful, must join with the majority in doing anything necessary to carry out that decision or act if it cannot be carried out otherwise.

(3) A trustee who delivers a written statement in accordance with subsection (2) is not liable for a loss or breach of trust arising from the decision or act even if the trustee joins with the majority in accordance with that subsection in order to carry out that decision or act.

(4) This section does not apply in respect of a trust created by a trust instrument executed before this section comes into force.

Commentary

This provision is based on Uniform Act section 53.

Trustee abstentions

60 If a trustee abstains from participating in a decision or act of the trustees because there is a conflict or potential conflict between the trustee's personal interest and the powers and duties of the office of trustee, the trustee is deemed not to be holding office for the purpose only of determining whether a decision is made or act is done by a majority of trustees holding office or unanimously by the trustees holding office.

Commentary

This provision is based on Uniform Act section 54 with one key change:

- This section applies regardless of when the trust was created and does not override section 2.

Deposit of trust property for safekeeping

61 A trustee is liable for a loss in the value of the trust property caused by the conduct of a financial institution or another person with whom trust property is deposited or left for safekeeping only if the trustee fails to

(a) exercise prudence in the selection of the financial institution or other person; or

(b) exercise reasonable and prudent supervision over the financial institution or other person.

Commentary

This provision is based on Uniform Act section 49(5).

Insuring trust property

62(1) A trustee may

(a) insure against loss or damage to any building or other insurable property to any amount; and

(b) pay the premiums for the insurance out of the income of the property or out of the income of any other property that is subject to the same trusts without obtaining the consent of any person entitled wholly or partly to that income.

(2) This section does not apply to any building or property that a trustee is bound forthwith to convey absolutely to a cestui que trust on being requested to do so.

Commentary

This provision is based on *Trustee Act* section 24 with one key change:

- A trustee should be able to insure the full value of the trust property.

Allocation of insurance proceeds

63(1) A trustee must allocate insurance proceeds to the capital of the trust if

(a) the trustee entered into a contract of insurance against loss of, or damage to, any trust property;

(b) the trustee paid the premiums owing under the contract; and

(c) insurance proceeds under the contract are paid to the trustee.

(2) If a beneficiary of a trust enters into a contract of insurance against loss of, or damage to, any trust property, whether or not the beneficiary is required by the trust instrument or by a third party to obtain the insurance, and insurance proceeds under the contract are paid to the beneficiary,

(a) the beneficiary must pay the insurance proceeds to the trustee;

(b) the trustee must allocate the insurance proceeds to the capital of the trust; and

(c) the trustee must reimburse the beneficiary for expenses incurred by the beneficiary in entering into the contract of insurance, in the amount the trustee considers in his or her opinion to reflect the interests of the other beneficiaries in the trust property.

(3) A trustee may apply all or part of the insurance proceeds received by the trustee under subsection (1) or (2) to the rebuilding, reinstating, replacing or major repair of the trust property that has been lost or damaged.

(4) Nothing in this section affects the rights of a secured party, lessor, lessee or other person

(a) to receive insurance proceeds; or

(b) to require that the insurance proceeds be applied to the rebuilding, reinstating, replacing or major repair of the trust property that has been lost or damaged.

(5) This section prevails over any contrary provisions in a trust instrument.

(6) This section applies only to proceeds under a contract of insurance that are payable after this section comes into force.

Commentary

This provision is based on Uniform Act section 55.

Part 5 — Variation and Termination of Trusts

Definition

64 In this Part, "arrangement" means

(a) a variation, resettlement or termination of a trust; or

(b) a variation or deletion of, or an addition to, the powers of a trustee in relation to the management or administration of a trust.

Commentary

This provision is based on Uniform Act section 57.

Application of this Part

65 This Part applies to

(a) vested or contingent interests in the trust property of the object of the trust; and

(b) trusts that arise by trust instrument other than an enactment.

Commentary

This provision is based on Uniform Act section 58 with one key change:

- The section provides that this Part applies to trusts that arise by trust instrument other than an enactment.

Arrangement requires court approval

66(1) Except as provided in this section, an arrangement requires approval of the court.

(2) On application by a trustee or beneficiary, the court may approve an arrangement after taking into account the following factors:

(a) the nature of all interests and the effect any proposed arrangement may have on those interests;

(b) the benefit or detriment to any person that may result from the court approving or declining to approve any proposed arrangement;

(c) the intentions of the settlor to the extent these can be ascertained;

(d) the impact of tax and other statutory provisions.

(3) Subject to subsection (4)(c), an application to approve an arrangement must have the consent in writing of all persons who are beneficially interested under the trust and who are capable of consenting.

(4) In an application under section (2), the court may approve an arrangement on behalf of any of the following persons who are beneficially interested in the trust:

(a) a person who is not capable of consenting because the person is a minor or is otherwise not of full capacity;

(b) a future person;

(c) a person, whether ascertained or not, who has a vested or contingent interest and whose existence or whereabouts cannot be established despite reasonable measures having been taken to discover that information;

(d) a person in respect of an interest of the person that may arise by reason of the person being in a class of persons that may benefit from a power of appointment that may or must be exercised by the trustee or any other donee of the power;

(e) a person who has the capacity to consent to the arrangement but refuses to consent to the arrangement;

(f) a charitable organization that is legally incapable of consenting in its own right;

(g) a charitable purpose or a non-charitable purpose described under section 74(1).

(5) The court may not approve an arrangement on behalf of any person under subsection (4) if the arrangement would reduce or remove any fixed indefeasible interest that has vested absolutely in a beneficiary.

(6) When an instrument creates a general power of appointment exercisable by deed, the donee of the power may only appoint to himself or herself if the instrument provides for self-appointment.

(7) This section prevails over any contrary provision in a trust instrument.

> Commentary
>
> This provision is based on *Trustee Act* section 42 and Uniform Act 60 with several changes.

Notice to [appropriate government office]

67(1) If a person applies to the court for an order under section 66(4) approving an arrangement

(a) in respect of a person referred to in section 66(4)(a) or (b); or

(b) in respect of a person referred to in section 66(4)(c) or (d) who is a minor or an incapacitated person, unless the person is an incapacitated person to whom section 92 applies,

the person making the application must serve notice of the application on the [appropriate government office] at least one month before the date set for the hearing of the application.

(2) If a person applies to the court for an order under section 66(4)(f) or (g) approving an arrangement, the person must serve notice of the application on the [appropriate government office] at least one month before the date set for the hearing of the application.

(3) The [appropriate government office] is entitled to appear and be heard on an application under section 66 and is entitled to the costs the court orders.

Commentary

This provision is based on Uniform Act section 61.

Part 6 — Trustee Compensation and Accounts

Application to estates

68(1) In this Part:

"trust" includes the estate of a deceased person;

"trustee" includes the personal representative of the estate of a deceased person, whether or not the property included in the estate is subject to a trust;

(2) This Part applies in respect of the estate of a person who dies before, on or after the date this Part comes into force.

Commentary

These provisions are based on Uniform Act sections 62(a) and 63.

In keeping with the drafting approach set out in the commentary of section 5 of this Act, the *Estate Administration Act* should be amended to provide for the application of Part 6 to all personal representatives. Section 68 is included here to highlight the application to personal representatives pending such amendments.

Compensation of trustee

69(1) A person is entitled to fair and reasonable compensation to be paid out of the trust property for services rendered as trustee of the trust.

(2) As part of the compensation to which a trustee is entitled under subsection (1), a trustee who

(a) has professional skills; and

(b) has rendered services to the trust, apart from those generally associated ith the office of trustee, that required the exercise of those professional skills

is entitled to charge fees at reasonable rates for those services that are reasonably necessary for the purpose of carrying out the trust.

(3) The trustees of a trust are not presumed to be entitled to equal compensation under subsection (1).

(4) On application by a trustee or beneficiary during the administration of the trust or on the passing of accounts, the court may determine the amount of compensation to which the trustee is entitled under subsection (1).

(5) In determining a trustee's compensation, the court may consider the following:

(a) the terms of any relevant contract;

(b) the gross value of the trust property at the time compensation is claimed;

(c) any change in the gross value of the trust property since compensation was last claimed or the trust was created and the portion of that change attributable to decisions of the trustee;

(d) the amount of revenue received and expenditures incurred in administering the trust;

(e) the complexity of the work involved in administering the trust, including whether or not any difficult or unusual questions were raised;

(f) any unusual difficulties or situations encountered in administering the trust;

(g) whether or not the trustee had to instruct on litigation relating to the trust;

(h) whether or not the trustee was required to manage a business, be the director of a corporation or perform other additional roles in administering the trust;

(i) the amount of skill, labour, responsibility, technological support and specialized knowledge required in administering the trust;

(j) the number and complexity of tasks relating to the administration of the trust that were delegated to others;

(k) the time expended in administering the trust;

(l) the number of trustees.

(6) An application under subsection (4) may be made even if the trust instrument provides for the determination of the amount of compensation.

(7) The court may enforce or vary the terms of compensation provided to a trustee:

(a) whether the terms are found in the trust instrument or another contract between the person making the trust and the trustee;

(b) whether the contract between the settlor and trustee is signed before or after the date of the trust instrument;

(c) whether the contract between the settlor and trustee is incorporated by reference into the trust instrument or not.

(8) This section prevails over any contrary provisions in a trust instrument.

Commentary

This provision is based on Uniform Act section 64 with two key changes:

- A beneficiary may apply under this section.
- The terms of any relevant contract are expressly mentioned.

Interim compensation of trustee

70(1) During the administration of the trust and without prior authorization of the court, if there is at least one beneficiary who is of full capacity and who has a vested beneficial interest in the trust property, a trustee may take payment out of the trust property in an amount that, in the trustee's opinion, is fair and reasonable compensation for services rendered as trustee of the trust during the period to which the payment relates.

(2) A trustee who takes a payment under subsection (1) must promptly deliver to the qualified beneficiaries and other trustees a notice stating:

(a) the amount of the payment;

(b) a description of the services rendered; and

(c) that, within a specified period of not less than two months from the date of the notice, a qualified beneficiary or trustee may apply to the court under subsection (3) to object to the payment.

(3) A qualified beneficiary or trustee may object to the payment under subsection (1) by bringing an application within the notice period specified in subsection (2)(c).

(4) A trustee who files an application under subsection (3) must serve notice of the application on all qualified beneficiaries and trustees.

(5) A qualified beneficiary who files an application under subsection (3) must serve notice of the application on the trustee and the trustee must then serve notice of the application on the other qualified beneficiaries.

(6) In an application under this section the court may determine the amount, if any, that the trustee may be paid under subsection (1).

Commentary

This provision is based on Uniform Act section 65 with two key changes:

- A trustee may bring an application under this section.
- Service is clarified.

Reimbursement of expenses

71 During the administration of the trust and without prior authorization of the court, a trustee may reimburse himself or herself out of the trust property for expenses incurred by the trustee in the administration of the trust.

Commentary

This provision is based on Uniform Act section 66.

Passing of accounts

72(1) On application by a qualified beneficiary or a trustee, the court may order that the trustee's accounts be passed on a single occasion or at intervals set by the court.

(2) A trustee making an application under subsection (1) must serve notice of the application on each of the qualified beneficiaries.

(3) A qualified beneficiary making an application under subsection (1) must serve notice of the application on the trustee and the trustee must then serve notice of the application on each of the other qualified beneficiaries.

(4) If a qualified beneficiary who receives notice under subsections (2) or (3) is a minor or an incapacitated person and the guardian or committee of the qualified beneficiary is not present at the passing of accounts, the court may determine, at the passing of accounts or at a subsequent hearing, that the qualified beneficiary is to be or is deemed to have been represented by another person who, at the passing of accounts,

(a) is of full capacity;

(b) has a substantially similar interest in the trust property; and

(c) is not in a conflict of interest with the qualified beneficiary in relation to any aspect of the accounts.

Commentary

This provision is based on Uniform Act section 67.

Repayment by trustee

73 If a trustee's compensation as finally determined by the court is less than the total of the payments taken by the trustee without court authorization during the administration of the trust, the trustee must restore the difference to the trust property.

Commentary

This provision is based on Uniform Act section 68.

Part 7 — Charitable Gifts, Charitable Trusts and Non-Charitable Purpose Trusts

Power of court to vary charitable gifts and charitable trusts

74(1) On application by the trustee of a charitable trust or by the personal representative of a donor of a charitable gift, the court may, subject to a gift over or reversion expressly provided for in the trust instrument, vary the terms of the trust or gift in accordance with subsection (2) if the court is of the opinion that

(a) an impracticability, impossibility or other difficulty hinders or prevents giving effect to the terms of the trust or gift; or

(b) a variation of the trust or gift would facilitate the carrying out of the charitable intent, whether general or specific, of the settlor or donor.

(2) On an application to vary the terms of the trust or gift as provided in subsection (1) the court must take into account the following factors:

(a) the nature of all interests and the effect any proposed variation may have on those interests;

(b) the benefit or detriment to any person that may result from the court approving or declining to approve any proposed variation;

(c) the intentions of the settlor to the extent these can be ascertained;

(d) the impact of tax and other statutory provisions.

(3) In varying the terms of the trust or gift under subsection (1), the court may do one or more of the following:

(a) vary, delete or add to the terms of the trust or gift;

(b) vary, delete or add to the powers of a trustee in relation to the management or administration of the trust;

(c) vary, delete or add to the powers of the donee in relation to the management or administration of the gift;

(d) if the court makes a finding under subsection (1)(a), vary or add to the terms of the trust or gift to provide for a purpose that is as close as is practicable or reasonable to an existing purpose of the trust or gift.

(4) For the purposes of a variation under subsection (1)

(a) it is irrelevant whether the charitable intent of the settlor or donor was general or specific; and

(b) if the terms of the trust or gift expressly provide for a gift over or a reversion in the event of the lapse or other failure of a charitable purpose, the gift over or reversion, if otherwise valid, shall take effect and the court may not vary the terms of the trust under subsection (1).

(5) This section prevails over any contrary provisions in a trust instrument.

(6) This section applies in respect of a gift given before, on or after the date this section comes into force.

Commentary

This provision is based on Uniform Act section 70 with the following key changes:

- An express gift over or reversion, if valid, shall take effect.
- The court must consider the listed factors in all applications to vary.

Power to order sale of property – charitable trust

75(1) On application, if a specific property held in trust for a charitable purpose can no longer be used advantageously for the charitable purpose or should for any other reason be sold, the court may authorize the sale of the property and give directions concerning the conduct of the sale and the application of the proceeds from the sale.

(2) An application under subsection (1) may be brought by any of the following:

(a) the [appropriate government office];

(b) the trustee;

(c) a person appearing to the court to have a sufficient interest in the matter.

(3) This section prevails over any contrary provisions in a trust instrument.

Commentary

This provision is based on Uniform Act section 72.

Notice to [appropriate government office]

76 If an application is made for an order under section 74 or 75 by a person other than the [appropriate government office], the order may not be made unless the person has served notice of the application on the [appropriate government office], and such other persons as the court may require, at least one month before the date set for the hearing of the application.

Commentary

This provision is based on Uniform Act section 73.

Non-charitable purpose trust

77(1) A person may create a trust that

(a) is for a non-charitable purpose that

(i) is recognised by law as being capable of being a valid object of a trust; or

(ii) is sufficiently certain to allow the trust to be carried out, is not contrary to public policy; and is

(A) for the performance of a function of government in Canada or

(B) a matter specified by regulation

and

(b) does not create an equitable interest in any person.

(2) A non-charitable purpose trust may exist indefinitely.

Commentary

This provision is based on Uniform Act section 74 with a key change:

- Purposes for which a society may be incorporated under the *Societies Act* should not be included in the valid non-charitable purposes for which a non-charitable purpose trust can be created.

Power of court to vary non-charitable purpose trusts

78(1) On application, if an impracticability, impossibility or other difficulty hinders or prevents giving effect to the terms of a non-charitable purpose trust, subject to subsection (5), the court may

(a) vary or add to the terms of the trust to provide for a purpose that is as close as is practicable or reasonable to an existing purpose of the trust; or

(b) if the court is unable to provide for a purpose that is as close as is practicable or reasonable to an existing purpose of the trust, vary or add to the terms of the trust to provide for a purpose that is consistent with the intention of the original settlement.

(2) Subject to subsection (5), if the court is of the opinion that a change in circumstances since the creation of the non-charitable purpose trust has resulted in a purpose of the trust being obsolete or no longer expedient, the court may vary or add to the terms of the trust to provide for a purpose that is consistent with the intention of the original settlement.

(3) In exercising the power under subsection (2), the court may consider the views of the settlor or the trustee concerning the obsolescence or expedience of the purpose of the trust and the proposed variation.

(4) On an application under subsections (1) and (2), the court must take into account the following factors:

(a) the nature of all interests and the effect any proposed variation may have on those interests;

(b) the benefit or detriment to any person that may result from the court approving, or declining to approve, any proposed variation;

(c) the intentions of the settlor to the extent these can be ascertained;

(d) the impact of tax and other statutory provisions.

(5) Subsections (1) and (2) do not apply if

(a) the trust instrument contains a valid direction concerning the ultimate disposition of the trust property, or

(b) the intention of the settlor concerning the ultimate disposition of the trust property can be inferred from the trust instrument and is valid.

(6) Despite subsections (1) and (2), if the court cannot determine a replacement purpose for a non-charitable purpose trust, the court may order that the trust property be returned to the settlor or to the settlor's personal representative.

(7) The court may make an order that it considers appropriate

(a) to enforce a non-charitable purpose trust, or

(b) to enlarge or otherwise vary the powers of the trustee of a non-charitable purpose trust.

(8) An application under this section may be made by any of the following:

(a) the [appropriate government office];

(b) a person appointed specifically by the settlor in the trust instrument to enforce the trust;

(c) the settlor;

(d) the personal representative of the settlor;

(e) the trustee;

(f) a person appearing to the court to have a sufficient interest in the matter.

Commentary

This provision is based on Uniform Act section 74 with a key change:

- The court must consider the listed factors in all arrangement approvals.

Imperfect trust provisions – charitable and non-charitable

79(1) A trust is not void by reason only that the objects of the trust consist of a charitable purpose and a non-charitable purpose.

(2) On application by a trustee or beneficiary, the court may make one or more of the following orders:

(a) an order that a charitable purpose constitutes the object of a separate charitable trust, if the court determines that it is practicable to separate the charitable purpose from a non-charitable purpose;

(b) an order that a non-charitable purpose constitutes the object of a separate non-charitable purpose trust, if the court determines that

(i) a non-charitable purpose trust may be validly created under section 74; and

(ii) it is practicable to separate the non-charitable purpose from the other objects of the original trust;

(c) an order that a charitable purpose and a non-charitable purpose constitute the objects of a separate non-charitable purpose trust, if

(i) the court determines that

(A) a non-charitable purpose may be validly created under section 77; and

(B) it is not practicable to separate the charitable purpose from the non-charitable purpose; and

(ii) the court makes an order under clause (a), (b) or (c) of this subsection separating other objects of the original trust;

(d) an order that the trust takes effect as a non-charitable purpose trust, if the court determines that

(i) a non-charitable purpose trust may be validly created under section 77; and

(ii) it is not practicable to separate any objects of the trust;

(3) If the court makes an order under subsection (2)(a) to (d), subject to any terms in the trust instrument regarding apportionment of the trust property or the manner in which a power of apportionment may be exercised, the trustee must divide the trust property as the trustee considers reasonable in the circumstances between any new trusts and powers of appointment.

(4) Despite subsection (2)(c) to (d), if the objects of a trust consist of a charitable purpose linked conjunctively or disjunctively with a purpose that is not described specifically but is referred to only by an indefinite qualifying term, such as "benevolent", "worthy" or "philanthropic", the trust takes effect as a charitable trust.

(5) The trustee must apply all of the property of the trust described in subsection (4) as if only the charitable purpose had been set out in the trust instrument.

Commentary

This provision is based on Uniform Act section 75 with the following changes:

- Beneficiaries may apply under the section.
- References to Uniform Act section 76 have been omitted pending the results of the *Perpetuities Act* project

Part 8 — Additional Powers of the Court

Non-performance by trustee

80(1) On application by a trustee or beneficiary, the court may determine whether a trustee has refused or failed

(a) to perform a duty imposed on the trustee; or

(b) to consider in good faith the exercise of a power conferred on the trustee,

(2) If the court is satisfied that a trustee has refused or failed to perform or exercise duties or powers as provided in subsection (1), the court may

(a) order the trustee to

(i) perform the duty; or

(ii) consider in good faith the exercise of the power and satisfy the court that the trustee has given due consideration to the exercise of the power, or

(b) remove the trustee.

Commentary

This provision is based on Uniform Act section 78 with one key change:

- A trustee should also be able to bring applications under this section.

Trustee may apply to court for directions

81(1) A trustee may apply to the court for directions on any matter or question of fact, law or discretion arising in respect of a trust.

(2) Without limiting subsection (1), if trustees are deadlocked on any matter arising with respect of a trust, a trustee may apply to the court for directions respecting the resolution of the matter.

(3) The duty of a trustee who follows the directions given under subsection (1) or (2) is discharged with respect to the subject matter of the directions, unless the trustee is guilty of fraud, wilful concealment or misrepresentation in obtaining the directions.

(4) This section prevails over any contrary provisions in a trust instrument.

> Commentary
>
> This provision is based on Uniform Act section 79.

Trustee may apply to court for order respecting distribution of trust property

82(1) On application by a trustee, the court may authorize the trustee to distribute trust property among the persons entitled to receive the trust property, with the trustee having regard only to

(a) the persons whom the trustee has been able to locate after making diligent efforts; or

(b) the claims or interests that the trustee has been able to determine after making diligent efforts.

(2) In making an order under subsection (1), the court may give directions respecting the procedure to be followed by the trustee in relation to a distribution of the trust property, including, without limitation, directions concerning the notice that must be given to persons who may have an interest in the distribution of the trust property.

(3) An order under subsection (1) does not prejudice the right of any creditor or claimant to follow the trust property into the hands of a person who receives it.

(4) This section prevails over any contrary provisions in a trust instrument.

> Commentary
>
> This provision is based on Uniform Act section 80.

Trustee may be relieved of liability for breach of trust

83(1) In this section, "exemption clause" means a provision of a trust instrument that excludes or restricts the liability of a trustee, including, without limitation, a provision that purports to do one or more of the following:

(a) make the enforcement of the liability of the trustee subject to restrictive or onerous conditions;

(b) permit a trustee to act despite a conflict between the trustee's personal interest and the powers and duties of the office of trustee;

(c) exclude or restrict any right or remedy in respect of the liability of a trustee, or prejudice any person who pursues such right or remedy;

(d) exclude or restrict rules of evidence;

(e) negate a duty that, in the absence of the provision, would otherwise be imposed on the trustee.

(2) The court may relieve a trustee or former trustee either wholly or partly from personal liability if the court is satisfied that

(a) the trustee or former trustee is or may be personally liable for a breach of trust, and

(b) the trustee or former trustee,

  (i) has acted honestly and reasonably; and

  (ii) ought fairly to be excused for the breach of trust.

(3) Subject to subsection (4), an exemption clause in a trust instrument is effective to relieve, according to its terms, a trustee of liability for a breach of trust.

(4) If the court is of the opinion that the conduct of a trustee

(a) constitutes a breach of trust, and

(b) has been so unreasonable, irresponsible or incompetent that, in fairness to the beneficiary, the trustee ought not to be relieved by an exemption clause from liability for the breach of trust,

the court may declare that any exemption clause contained in the trust instrument is ineffective in relation to that breach of trust, and that the liability of the trustee for breach of trust is as if the trust instrument did not contain the clause.

(5) An application under this section may be brought by any of the following:

(a) a beneficiary;

(b) a trustee;

(c) a secured party.

(6) This section prevails over any contrary provisions in a trust instrument.

Commentary

This provision is based on Uniform Act section 81.

Contribution and indemnity

84(1) In this section, "breach of trust" includes any act or omission that gives rise to the liability of a trustee to the beneficiaries of the trust, regardless of whether the act or omission

(a) is intentional;

(b) is negligent; or

(c) would give rise to a right for contribution or indemnity apart from this Act.

(2) This section applies only with respect to a breach of trust

(a) that is the subject of a legal proceeding commenced after this Act comes into force; or

(b) if no legal proceeding has been commenced for breach of trust, for which a claim for contribution or indemnity is made after this Act comes into force.

(3) Except as provided in this section, a trustee is not obligated to contribute to or indemnify a co-trustee in relation to a breach of trust.

(4) If a trustee commits a breach of trust, the court, having regard to the responsibility of each trustee for the loss to the trust, may determine the amount the court considers appropriate

(a) for which each trustee is liable in order to make good the loss to the trust; or

(b) that a trustee must contribute to another trustee.

(5) The court may

(a) exempt a trustee from liability to make a contribution to another trustee; or

(b) order that any contribution due to, or to be recovered from, a trustee amounts to a complete indemnity.

(6) The powers conferred on the court by this section may be exercised even if the trustee claiming contribution or indemnity or the trustee against whom the claim is made, or both of them, have acted fraudulently in breach of trust.

(7) If a trustee in breach of trust is insolvent, the court may apportion liability for making good the loss to the trust and any other losses as is appropriate among other solvent co-trustees who are found liable.

(8) If the beneficiaries have settled with a trustee who is in breach of trust and who subsequently seeks contribution from a co-trustee, the court, in making any contribution order and without limiting subsections (4) and (5), may consider whether the settlement was reasonable.

Commentary

This provision is based on Uniform Act section 82.

Beneficiaries instigating breaches of trust

85(1) If a trustee commits a breach of trust, and the breach was at the instigation or request or with the consent of some but not all of the beneficiaries, the court may order the beneficiaries who instigated, requested or consented to the breach to contribute to or indemnify the trustee or persons claiming through the trustee.

(2) If the court makes an order under subsection (1), the court may order that all or part of the interest of the beneficiaries in the trust is to be used to satisfy the obligation to contribute or indemnify the trustee or persons claiming through the trustee.

Commentary

This provision is based on Uniform Act section 83.

Payment into court

86(1) A trustee may pay into or deposit in court trust money or trust securities.

(2) If a trustee is not available to receive payment or transfer of trust money or trust securities and give a receipt for the trust money or trust securities, the court may order, on application by a person in possession or control of the trust money or trust securities, that the trust money or trust securities be paid into or deposited in court.

(3) A receipt given by a [proper officer of the court in the jurisdiction] for any money or securities paid into or deposited in court under subsection (1) or (2) relieves the trustee or other person paying or depositing the money or securities from any further obligations relating to the money or securities.

(4) This section prevails over any contrary provisions in a trust instrument.

Commentary

This provision is based on Uniform Act section 84.

Costs paid by party or out of trust property

87(1) The court may order costs of a proceeding under this Act, in the amounts or proportions the court may order, to be paid

(a) by or to a party to the proceeding; or

(b) out of the trust property.

(2) The court may order costs of a transfer of or other transaction respecting trust property, in the amounts or proportions the court may order, to be paid out of the trust property.

(3) For the purposes of subsection (1)(b) or (2), the court may designate all or part of the trust property as the source for the payment.

Commentary

This provision is based on Uniform Act section 86.

Part 9 — Perpetuities and Accumulations

Commentary

Review of the rule against perpetuities and related provisions is the subject of a separate project. Reference to Part 9 is included here as a place holder.

Part 10 — General

Assumptions if notice of trust

88(1) Subsection (2) applies to a person who receives notice of the existence of a trust by reason only of the production or registration of a document evidencing

(a) an appointment of a trustee;

(b) a trustee ceasing to hold office; or

(c) a vesting property in a trustee.

(2) A person to whom this subsection applies may assume without inquiry that

(a) a former trustee possessed the powers the former trustee exercised or purported to exercise over the trust property; and

(b) a current trustee has the powers the current trustee has exercised or purports to exercise over the trust property.

(3) This section prevails over any contrary provisions in a trust instrument.

Commentary

This provision is based on Uniform Act section 95.

Purchaser takes property subject to trust if notice of defect

89(1) In this section, "purchaser" means

(a) a purchaser for value;

(b) a secured party; or

(c) any other person who for value received an interest in or a claim on trust property.

(2) Subject to the *Land Titles Act* a purchaser of trust property takes the trust property subject to the terms of the trust if the purchaser, at the time of the purchase, has received notice that

(a) a former trustee did not possess, or a current trustee does not possess, a power purported to be exercised with respect to the trust property, or

(b) a former trustee or current trustee has acted in breach of trust with respect to the trust property.

(3) This section prevails over any contrary provisions in a trust instrument.

Commentary

This provision is based on Uniform Act section 96 with one key change:

- The section is subject to the *Land Titles Act.*

Person not liable if compliant with Act or order

90(1) Subject to this Act, a person who complies with this Act or an order made under this Act is not liable for a loss arising from anything done or permitted to be done under this Act, unless it was done or permitted to be done in bad faith.

(2) This section prevails over any contrary provisions in a trust instrument.

Commentary

This provision is based on Uniform Act section 97.

Receipt relieves person from further obligation

91 A receipt given by a trustee for any money or other property received by the trustee relieves the person paying or otherwise transferring the money or other property from any further obligation relating to the money or other property.

Commentary

This provision is based on Uniform Act section 98.

Represented adults

92(1) If a beneficiary is a represented adult for whom a guardian or trustee has been appointed under the *Adult Guardianship and Trusteeship Act*, the guardian or trustee is the representative of that beneficiary for the purposes of this Act.

(2) Without limiting subsection (1),

(a) any action required or permitted to be taken by the beneficiary;

(b) any notice or report required or permitted to be given to the beneficiary; and

(c) any consent or agreement required or permitted to be given by the beneficiary

is validly taken or given if taken by, given to or given by the guardian or trustee on behalf of the beneficiary.

(3) The guardian of the estate of a beneficiary who is a minor is the representative of that beneficiary for the purpose of receiving or taking delivery of any notice or report required or permitted to be given under this Act.

> Commentary
>
> This provision is based on Uniform Act section 99.

Agent of beneficiary

93 For the purposes of this Act,

(a) any action required or permitted to be taken by a beneficiary;

(b) any notice or report required or permitted to be given to a beneficiary; and

(c) any consent or agreement required or permitted to be given by a beneficiary

is validly taken or given if taken by, given to or given by an agent of the beneficiary acting within the scope of the authority conferred by that beneficiary.

> Commentary
>
> This provision is based on Uniform Act section 100.

Delivery of Documents

94(1) In this section

(a) "electronic" has the same meaning as in the *Electronic Transactions Act*;

(b) "recorded mail" means a form of delivery by mail or courier in which receipt of the document or notice must be acknowledged in writing.

(2) Where this Act requires documents or notice to be delivered to a person, the documents or notice may be delivered

(a) in person or to a lawyer who is authorized to accept delivery on behalf of a person;

(b) by recorded or ordinary mail; or

(c) by electronic transmission.

> Commentary
>
> This provision is new and is based on *Surrogate Rules* section 60(1).

Regulations

95 The Minister may, by regulation, do the following:

(a) set a specified percentage for the purpose of total return investments under section 43;

(b) vary the valuation period for total return investments set out in section 43;

(c) specify matters for which a non-charitable purpose trust may be created under section 77.

Part 11 — Transitional Provisions, Repeals and Consequential Amendments

Commentary

This is a place holder for eventual provisions.